THE GREAT SEAL OF THE STATE OF MISSISSIPPI
IN GOD WE TRUST

MISSISSIPPI CODE 1972
Annotated

Criminal Procedure

(§ 99-1-1 to
§ 99-19-401)

Title 99

TABLE OF CONTENTS

VOLUME 22

TITLE 99

CRIMINAL PROCEDURE

CHAP.		BEGINNING SECTION
1.	General Provisions; Time Limitations; Costs	99-1-1
3.	Arrests	99-3-1
5.	Bail	99-5-1
7.	Indicment	99-7-1
9.	Process	99-9-1
11.	Jurisdiction and Venue	99-11-1
13.	Insanity Proceedings	99-13-1
15.	Pretrial Proceedings	99-15-1
17.	Trial	99-17-1
18.	Office of State Public Defender	99-18-1
19.	Judgement, Sentence, and Execution	99-19-1

TITLE 99 — Continued in Volume 22A

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME TWENTY-TWO

CRIMINAL PROCEDURE

§§ 99-1-1 to 99-19-401

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2020 REGULAR
LEGISLATIVE SESSION

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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2020 Replacement Volume 22 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume, the 2000 Replacement Volume 21A, the 2007 Replacement Volume 21A, and the 2015 Replacement Volume 21A, , as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2020 Regular Legislative Session.

This volume contains the text of Chapters 1 through 19 of Title 99 of the Mississippi Code of 1972 Annotated, as amended through the 2020 Regular Legislative Session.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals decisions and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 3rd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal 2nd Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

PUBLISHER'S FOREWORD

A comprehensive Index appears at the end of this volume.

Visit the LexisNexis website at http://www.lexisnexis.com for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 555 Middle Creek Parkway, Colorado Springs, CO 80921.

December 2020 LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

— Advance Code Service
— Advance Sheets
— Amendment Notes
— Analyses
— Code Status
— Comparable Legislation from other States
— Court Rules
— Cross References
— Editor's Notes
— Effective Dates
— Federal Aspects
— History Notes
— Index
— Joint Legislative Committee Notes
— Judicial Decisions
— Opinions of the Attorney General
— Organization and Numbering System
— Placement of Notes
— Replacement Volumes
— Research and Practice References
— Statute Headings
— Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are retained online indefinitely.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects.*

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates.*

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States.*

HISTORY NOTES

Each section of the Code is followed by a brief note showing the acts of the Legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The history note follows the section text, preceding any other annotations for the section. Information in the history note is listed in chronological order, first by Codes, then by Laws, with the most recent information listed last. If a section has been renumbered, the former number will appear in the history note.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

OPINIONS OF THE ATTORNEY GENERAL

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Opinions of the Attorney General."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

GENERAL OUTLINE OF TITLES AND CHAPTERS

Constitution of the United States .... Volume 1
Constitution of Mississippi .... Volume 1
Amendments .... Volume 1

TITLE 1. LAWS AND STATUTES

Beginning Section
Chapter 1. Code of 1972 1-1-1
3. Construction of Statutes 1-3-1
5. Session Laws and Journals 1-5-1

TITLE 3. STATE SOVEREIGNTY, JURISDICTION AND HOLIDAYS

Chapter 1. State Sovereignty Commission [Repealed] 3-1-1
3. State Boundaries, Holidays, and State Emblems 3-3-1
5. Acquisition of Land by United States Government 3-5-1
7. Compact for a Balanced Budget 3-7-1

TITLE 5. LEGISLATIVE DEPARTMENT

Chapter 1. Legislature 5-1-1
3. Legislative Committees 5-3-1
5. Interstate Cooperation 5-5-1
7. Lobbying [Repealed] 5-7-1
8. Lobbying Law Reform Act of 1994 5-8-1
9. Agency Review 5-9-1
11. Abolishment of Agencies 5-11-1

TITLE 7. EXECUTIVE DEPARTMENT

Chapter 1. Governor 7-1-1
3. Secretary of State 7-3-1
5. Attorney General 7-5-1
7. State Fiscal Officer; Department of Audit 7-7-1
9. State Treasurer 7-9-1
11. Secretary of State; Land Records 7-11-1
13. Mississippi Administrative Reorganization Act 7-13-1
15. Executive Branch Reorganization Study Commission [Repealed] 7-15-1
17. Mississippi Executive Reorganization Act of 1989 7-17-1

TITLE 9. COURTS

Beginning Section

CHAPTER 1. Provisions Common to Courts 9-1-1
3. Supreme Court 9-3-1
4. Court of Appeals of the State of Mississippi 9-4-1
5. Chancery Courts 9-5-1
7. Circuit Courts 9-7-1
9. County Courts 9-9-1
11. Justice Courts 9-11-1
13. Court Reporters and Court Reporting 9-13-1
15. Judicial Council [Repealed] 9-15-1
17. Court Administrators 9-17-1
19. Commission on Judicial Performance 9-19-1
21. Administrative Office of Courts 9-21-1
23. Drug Courts 9-23-1
25. Veterans Treatment Courts 9-25-1
27. Rivers McGraw Mental Health Diversion Pilot Program Act 9-27-1

TITLE 11. CIVIL PRACTICE AND PROCEDURE

CHAPTER 1. Practice and Procedure Provisions Common to Courts 11-1-1
3. Practice and Procedure in Supreme Court 11-3-1
5. Practice and Procedure in Chancery Courts 11-5-1
7. Practice and Procedure in Circuit Courts 11-7-1
9. Practice and Procedure in County Courts and Justice Courts 11-9-1
11. Venue of Actions 11-11-1
13. Injunctions 11-13-1
15. Arbitration and Award 11-15-1
17. Suits to Confirm Title or Interest and to Remove Clouds on Title 11-17-1
19. Ejectment 11-19-1
21. Partition of Property 11-21-1
23. Trial of Right of Property 11-23-1
25. Unlawful Entry and Detainer 11-25-1
27. Eminent Domain 11-27-1
29. Sequestration 11-29-1
31. Attachment in Chancery Against Nonresident, Absent or Absconding Debtors 11-31-1
33. Attachment at Law Against Debtors 11-33-1
35. Garnishment 11-35-1
37. Replevin 11-37-1
38. Claim and Delivery 11-38-1

TITLE 11. CIVIL PRACTICE AND PROCEDURE (Cont'd)

Beginning Section

39. Quo Warranto 11-39-1
41. Mandamus; Prohibition 11-41-1
43. Habeas Corpus 11-43-1
44. Compensation to Victims of Wrongful Conviction and Imprisonment 11-44-1
45. Suits by and Against the State or Its Political Subdivisions 11-45-1
46. Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees 11-46-1
47. Lis Pendens 11-47-1
49. Rights and Duties of Attorneys, Generally 11-49-1
51. Appeals 11-51-1
53. Costs 11-53-1
55. Litigation Accountability Act of 1988 11-55-1
57. Structured Settlements 11-57-1
59. Uniform Interstate Depositions and Discovery Act 11-59-1
61. Mississippi Religious Freedom Restoration Act 11-61-1
62. Protecting Freedom of Conscience from Government Discrimination Act 11-62-1
63. Application of Foreign Law 11-63-1
65. Enforcement of Federal Laws, Orders, Rules ... 11-65-1
67. Asbestos Bankruptcy Trust Claims Transparency Act 11-67-1
69. Liability Exemption for Furnishing Information Concerning Insurance Fraud 11-69-1
71. Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act 11-71-1

TITLE 13. EVIDENCE, PROCESS AND JURIES

CHAPTER 1. Evidence 13-1-1
3. Process, Notice, and Publication 13-3-1
5. Juries 13-5-1
7. State Grand Jury Act 13-7-1

TITLE 15. LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS

CHAPTER 1. Limitation of Actions 15-1-1
3. Prevention of Frauds 15-3-1

TITLE 17. LOCAL GOVERNMENT; PROVISIONS COMMON TO COUNTIES AND MUNICIPALITIES

Beginning Section

CHAPTER 1. Zoning, Planning and Subdivision Regulation .. 17-1-1
2. Building Codes 17-2-1
3. Promotion of Trade, Conventions and Tourism 17-3-1
5. Jails, Waterworks and Other Improvements 17-5-1
7. Removal of Local Governments in Emergencies 17-7-1
9. Lease of Mineral Lands other than Sixteenth Section or "In Lieu" Lands 17-9-1
11. Gulf Regional District Law 17-11-1
13. Interlocal Cooperation of Governmental Units 17-13-1
15. Human Resource Agencies 17-15-1
17. Solid Wastes Disposal 17-17-1
18. Mississippi Hazardous Waste Facility Siting Act of 1990 17-18-1
19. Appropriations to Planning and Development Districts 17-19-1
21. Finance and Taxation 17-21-1
23. Rural Fire Truck Acquisition Assistance Programs 17-23-1
25. General Provisions Relating to Counties and Municipalities 17-25-1
27. Municipal Historical Hamlet Act 17-27-1
29. Mississippi Entertainment District Act 17-29-1

TITLE 19. COUNTIES AND COUNTY OFFICERS

CHAPTER 1. County Boundaries 19-1-1
2. County Government Reorganization Act 19-2-1
3. Board of Supervisors 19-3-1
4. County Administrator 19-4-1
5. Health, Safety and Public Welfare 19-5-1
7. Property and Facilities 19-7-1
9. Finance and Taxation 19-9-1
11. County Budget 19-11-1
13. Contracts, Claims and Transaction of Business with Counties 19-13-1
15. Records and Recording 19-15-1
17. County Auditors 19-17-1
19. Constables 19-19-1
21. Coroners 19-21-1
23. County Attorneys 19-23-1
25. Sheriffs 19-25-1
27. Surveyors and Surveys 19-27-1

TITLE 19. COUNTIES AND COUNTY OFFICERS (Cont'd)

Beginning Section
29. Local and Regional Railroad Authorities 19-29-1
31. Public Improvement Districts 19-31-1

TITLE 21. MUNICIPALITIES

Chapter 1. Classification, Creation, Abolition, and Expansion 21-1-1
3. Code Charters 21-3-1
5. Commission Form of Government 21-5-1
7. Council Form of Government 21-7-1
8. Mayor-Council Form of Government 21-8-1
9. Council-Manager Plan of Government 21-9-1
11. Municipal Elections [Repealed] 21-11-1
13. Ordinances 21-13-1
15. Officers and Records 21-15-1
17. General Powers 21-17-1
19. Health, Safety, and Welfare 21-19-1
21. Police and Police Departments 21-21-1
23. Municipal Courts 21-23-1
25. Fire Departments and Fire Districts 21-25-1
27. Public Utilities and Transportation 21-27-1
29. Employees' Retirement and Disability Systems 21-29-1
31. Civil Service 21-31-1
33. Taxation and Finance 21-33-1
35. Municipal Budget 21-35-1
37. Streets, Parks and Other Public Property 21-37-1
38. Acquisition or Lease of Real Property from Federal Government for Parks, Recreation, and Tourism 21-38-1
39. Contracts and Claims 21-39-1
41. Special Improvements 21-41-1
43. Business Improvement Districts 21-43-1
45. Tax Increment Financing 21-45-1
47. Delta Natural Gas District 21-47-1

TITLE 23. ELECTIONS

Chapter 1. Qualification of Candidates and Registration of Political Parties [Repealed] 23-1-1
3. Corrupt Practices [Repealed] 23-3-1
5. Registration and Elections [Repealed] 23-5-1
7. Voting Machines and Electronic Voting System [Repealed] 23-7-1

TITLE 23. ELECTIONS (Cont'd)

		Beginning Section
9.	Absentee Ballot [Repealed]	23-9-1
11.	Presidential Election Law [Repealed]	23-11-1
13.	Mississippi Presidential Preference Primary and Delegate Selection Law [Repealed]	23-13-1
15.	Mississippi Election Code	23-15-1
17.	Amendments to Constitution by Voter Initiative	23-17-1

TITLE 25. PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS

CHAPTER	1.	Public Officers; General Provisions	25-1-1
	3.	Salaries and Compensation	25-3-1
	4.	Ethics in Government	25-4-1
	5.	Removals From Office	25-5-1
	7.	Fees	25-7-1
	9.	Statewide Personnel System	25-9-1
	11.	Social Security and Public Employees' Retirement and Disability Benefits	25-11-1
	13.	Highway Safety Patrol Retirement System	25-13-1
	14.	Government Employees Deferred Compensation Plan Law	25-14-1
	15.	Group Insurance for Public Employees	25-15-1
	17.	Cafeteria Fringe Benefit Plans	25-17-1
	19.	Public Employer-Assisted Housing Program	25-19-1
	31.	District Attorneys	25-31-1
	32.	Public Defenders	25-32-1
	33.	Notaries Public	25-33-1
	34.	Revised Mississippi Law on Notarial Acts	25-34-1
	41.	Open Meetings	25-41-1
	43.	Administrative Procedures	25-43-1.101
	45.	Permit and Licensing Procedures	25-45-1
	51.	State Depository for Public Documents	25-51-1
	53.	Mississippi Department of Information Technology Services (MDITS)	25-53-1
	55.	Lost Records	25-55-1
	57.	Destruction of Records [Repealed]	25-57-1
	58.	Geographic Information System	25-58-1
	59.	Archives and Records Management	25-59-1
	60.	Local Government Records	25-60-1
	61.	Public Access to Public Records	25-61-1
	62.	Disclosure of Personal Information of Section 501(c) Entitly	25-62-1
	63.	Digital Signature Act	25-63-1

TITLE 25. PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS (Cont'd)

			Beginning Section
	65.	Agency, University and Community/Junior College Internal Auditing Program	25-65-1

TITLE 27. TAXATION AND FINANCE

Chapter	1.	Assessors and County Tax Collectors	27-1-1
	3.	Department of Revenue	27-3-1
	4.	Board of Tax Appeals	27-4-1
	5.	Motor Vehicle Comptroller	27-5-1
	7.	Income Tax and Withholding	27-7-1
	8.	Mississippi S Corporation Income Tax Act	27-8-1
	9.	Estate Tax	27-9-1
	10.	Uniform Estate Tax Apportionment Act	27-10-1
	11.	Amusement Tax [Repealed]	27-11-1
	13.	Corporation Franchise Tax	27-13-1
	15.	Statewide Privilege Taxes	27-15-1
	17.	Local Privilege Taxes	27-17-1
	19.	Motor Vehicle Privilege and Excise Taxes	27-19-1
	21.	Finance Company Privilege Tax	27-21-1
	23.	Chain Store Privilege Tax [Repealed]	27-23-1
	25.	Severance Taxes	27-25-1
	27.	Vending and Amusement Machine Taxes	27-27-1
	29.	Ad Valorem Taxes—General Provisions	27-29-1
	31.	Ad Valorem Taxes—General Exemptions	27-31-1
	33.	Ad Valorem Taxes—Homestead Exemptions	27-33-1
	35.	Ad Valorem Taxes—Assessment	27-35-1
	37.	Ad Valorem Taxes—Payments in Lieu of Taxes	27-37-1
	38.	Ad Valorem Taxes—Telecommunications Tax Reform	27-38-1
	39.	Ad Valorem Taxes—State and Local Levies	27-39-1
	41.	Ad Valorem Taxes—Collection	27-41-1
	43.	Ad Valorem Taxes—Notice of Tax Sale to Owners and Lienors	27-43-1
	45.	Ad Valorem Taxes—Redemption of Land Sold for Taxes	27-45-1
	47.	Ad Valorem Taxes—Assignment of Tax Liens	27-47-1
	49.	Ad Valorem Taxes—Insolvencies	27-49-1
	51.	Ad Valorem Taxes—Motor Vehicles	27-51-1
	53.	Ad Valorem Taxes—Mobile Homes	27-53-1
	55.	Gasoline and Motor Fuel Taxes	27-55-1
	57.	Tax on Oils	27-57-1
	59.	Liquefied Compressed Gas Tax	27-59-1

TITLE 27. TAXATION AND FINANCE (Cont'd)

Beginning Section

61. Interstate Commercial Carriers Motor Fuel Tax 27-61-1
63. Motor Vehicle Fueling Centers [Repealed] 27-63-1
65. Sales Tax 27-65-1
67. Use or Compensating Taxes 27-67-1
68. Uniform Sales and Use Tax Administration Law 27-68-1
69. Tobacco Tax 27-69-1
70. Nonsettling-Manufacturer Cigarette Fee 27-70-1
71. Alcoholic Beverage Taxes 27-71-1
73. Tax Refunds 27-73-1
75. Reciprocal Collection of Taxes 27-75-1
77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the Department of Revenue 27-77-1
101. Annual Reports by Departments of Government, State-Supported Institutions and Taxing Entities 27-101-1
103. State Budget 27-103-1
104. State Fiscal Affairs 27-104-1
105. Depositories 27-105-1
106. Iran Divestment Act of 2015 27-106-1
107. Disaster Relief 27-107-1
109. Cruise Vessels 27-109-1
111. Payment Credit Vouchers as Credit Against Income and Corporation Franchise Tax Liabilities [Repealed effective July 1, 2018] 27-111-1
113. Facilitating Business Rapid Response to State Declared Disasters Act of 2015 27-113-1
115. Alyce G. Clarke Mississippi Lottery Law 27-115-1
117. Israel Support Act of 2019 27-117-1

TITLE 29. PUBLIC LANDS, BUILDINGS AND PROPERTY

Chapter 1. Public Lands 29-1-1
3. Sixteenth Section and Lieu Lands 29-3-1
5. Care of Capitol, Old Capitol, State Office Buildings and Executive Mansion 29-5-1
7. Mineral Leases of State Lands 29-7-1
9. Inventories of State Property 29-9-1
11. Energy Conservation in Public Buildings [Repealed] 29-11-1
13. Flood Insurance for State-Owned Buildings 29-13-1
15. Public Trust Tidelands 29-15-1
17. State Agency Repair and Renovation 29-17-4

TITLE 31. PUBLIC BUSINESS, BONDS AND OBLIGATIONS

Beginning Section

CHAPTER 1. General Provisions Relative to Public Contracts 31-1-1
3. State Board of Public Contractors 31-3-1
5. Public Works Contracts 31-5-1
7. Public Purchases 31-7-1
8. Acquisition of Public Buildings, Facilities, and Equipment Through Rental Contracts 31-8-1
9. Surplus Property Procurement Commission 31-9-1
11. State Construction Projects 31-11-1
13. Validation of Public Bonds 31-13-1
15. Refunding Bonds 31-15-1
17. State Bonds; Retirement of Bonds 31-17-1
18. Variable Rate Debt Instruments 31-18-1
19. Public Debts 31-19-1
21. Registered Bonds 31-21-1
23. Mississippi Private Activity Bonds Allocation Act 31-23-1
25. Mississippi Development Bank Act 31-25-1
27. Mississippi Bond Refinancing Act 31-27-1
29. Institute for Technology Development 31-29-1
31. Mississippi Telecommunications Conference and Training Center 31-31-1

TITLE 33. MILITARY AFFAIRS

CHAPTER 1. Definitions and General Provisions Relating to the Military Forces 33-1-1
3. Commander in Chief, Military Department, and Governor's Staff 33-3-1
4. Mississippi Military Family Relief Fund 33-4-1
5. The Militia and Mississippi State Guard 33-5-1
7. National Guard 33-7-1
9. Property and Finances 33-9-1
11. Training Facilities 33-11-1
13. Mississippi Code of Military Justice 33-13-1
15. Emergency Management and Civil Defense 33-15-1

TITLE 35. WAR VETERANS AND PENSIONS

CHAPTER 1. State Veterans Affairs Board 35-1-1
3. Military Veterans; Miscellaneous Provisions 35-3-1
5. Guardianship of Veterans 35-5-1
7. Veterans' Home Purchase Law 35-7-1
9. Pensions [Repealed] 35-9-1

TITLE 37. EDUCATION

Beginning Section

CHAPTER 1. State Board of Education 37-1-1
3. State Department of Education 37-3-1
4. Mississippi Community College Board 37-4-1
5. County Boards of Education and Superintendents 37-5-1
6. Mississippi Uniform School Law 37-6-1
7. School Districts; Boards of Trustees of School Districts 37-7-1
9. District Superintendents, Principals, Teachers, and Other Employees 37-9-1
11. General Provisions Pertaining to Education 37-11-1
12. Mississippi Student Religious Liberties Act of 2013 37-12-1
13. Curriculum; School Year and Attendance 37-13-1
14. Mary Kirkpatrick Haskell-Mary Sprayberry Public School Nurse Act of 2007 37-14-1
15. Public Schools; Records, Enrollment and Transfer of Pupils 37-15-1
16. Statewide Testing Program 37-16-1
17. Accreditation of Schools 37-17-1
18. Superior-Performing, Exemplary and School At-Risk Schools Programs 37-18-1
19. Teacher Compensation 37-19-1
20. Remedial Education 37-20-1
21. Early Childhood Education 37-21-1
22. State Funds for School Districts 37-22-1
23. Exceptional Children 37-23-1
24. Mississippi Youth Concussion Law 37-24-1
25. Driver Education and Training 37-25-1
26. State Court Education Fund 37-26-1
27. Agricultural High Schools 37-27-1
28. Mississippi Charter Schools Act of 2013 37-28-1
29. Junior Colleges 37-29-1
31. Vocational Education 37-31-1
33. Civilian Vocational Rehabilitation 37-33-1
35. Adult Education 37-35-1
37. Public Schools; Accounting and Auditing 37-37-1
39. Public Schools; Purchases 37-39-1
41. Transportation of Pupils 37-41-1
43. Textbooks 37-43-1
45. State Aid to Public Schools 37-45-1
47. State Aid for Construction of School Facilities 37-47-1

TITLE 37. EDUCATION (Cont'd)

Beginning Section

49. Loans to Students 37-49-1
51. Financial Assistance to Children Attending Nonsectarian Private Schools 37-51-1
53. Summer Normals [Repealed] 37-53-1
55. School Libraries 37-55-1
57. Taxation 37-57-1
59. School Bonds and Obligations 37-59-1
61. Expenditure of School Funds; Budgets 37-61-1
63. Educational Television 37-63-1
65. Closing of Public Schools and Institutions of Higher Learning 37-65-1
67. Distance Learning Collaborative Act of 2016 37-67-1
68. Equity in Distance Learning Act 37-68-1
69. The Energy Academy Act 37-69-1
71. Mississippi Learn to Earn Act 37-71-1
101. Institutions of Higher Learning; General Provisions 37-101-1
102. Off-campus Instructional Programs 37-102-1
103. Residency and Fees of Students Attending or Applying for Admission to Educational Institutions 37-103-1
104. Mississippi Educational Facilities Authority Act for Private, Nonprofit Institutions of Higher Learning 37-104-1
105. Campuses and Streets of State Institutions of Higher Learning 37-105-1
106. Post-Secondary Education Financial Assistance 37-106-1
107. Scholarships for Children of Deceased or Disabled Law Enforcement Officers or Firemen [Repealed] 37-107-1
108. Scholarships for Children of Prisoners of War or Men Missing in Action 37-108-1
109. Medical Education Loans and Scholarships. [Repealed] 37-109-1
110. Mississippi Public Management Graduate Intern Program 37-110-1
111. Fraternities, Sororities and Other Societies 37-111-1
113. Mississippi State University of Agriculture and Applied Science 37-113-1
115. University of Mississippi 37-115-1
117. Mississippi University for Women 37-117-1
119. University of Southern Mississippi 37-119-1
121. Alcorn State University 37-121-1

TITLE 37. EDUCATION (Cont'd)

Beginning Section
123. Delta State University 37-123-1
125. Jackson State University 37-125-1
127. Mississippi Valley State University 37-127-1
129. Nursing Schools and Scholarships 37-129-1
131. Teachers Demonstration and Practice Schools 37-131-1
132. Student Teachers 37-132-1
133. Technical Institutes 37-133-1
135. Compacts with Other States 37-135-1
137. School Asbestos Hazard Elimination Act [Repealed] 37-137-1
138. Asbestos Abatement Accreditation and Certification Act 37-138-1
139. Mississippi School for Mathematics and Science 37-139-1
140. Mississippi School of the Arts 37-140-1
141. The University Research Center Act of 1988 ... 37-141-1
143. Omnibus Loan or Scholarship Act of 1991 37-143-1
144. Mississippi Rural Physicians Scholarship Program 37-144-1
145. Mississippi Opportunity Loan Program Act 37-145-1
146. Mississippi Rural Dentists Scholarship Program 37-146-1
147. Mississippi University Research Authority Act 37-147-1
148. Strengthening Mississippi Academic Research Through Business Act 37-148-1
149. Mississippi Teacher Center 37-149-1
151. Mississippi Accountability and Adequate Education Program Act of 1997 37-151-1
152. Commission on Restructuring the Mississippi Adequate Education Program (MAEP) 37-152-1
153. Workforce Training and Education Consolidation Act 37-153-1
154. State Longitudinal Data System 37-154-1
155. College Savings Plans of Mississippi 37-155-1
157. Student Tuition Assistance 37-157-1
159. Mississippi Teacher Scholarship Programs 37-159-1
160. Teach for America Act 37-160-1
161. Mississippi Education Reform Act of 2006 37-161-1
163. Education Achievement Council 37-163-1
165. Conversion Charter School Act of 2010 37-165-1
167. New Start School Program [Repealed] 37-167-1
169. Mississippi Autism Advisory Committee 37-169-1
171. Use of School Property by Public for Recreation and Sports 37-171-1

TITLE 37. EDUCATION (Cont'd)

Beginning Section
173. Dyslexia Therapy Scholarship for Students with Dyslexia Program 37-173-1
175. Mississippi Speech-Language Therapy Scholarship for Students with Speech-Language Impairments Program 37-175-1
177. Literacy-Based Promotion Act 37-177-1
179. Districts of Innovation 37-179-1
181. Equal Opportunity for Students with Special Needs Act 37-181-1
183. Postsecondary Education COVID-19 Mitigation Relief Program Act 37-183-1
185. Independent Schools' COVID-19 Assistance Grant Program Act. 37-185-1
187. Mississippi Pandemic Response Broadband Availability Act 37-187-1

TITLE 39. LIBRARIES, ARTS, ARCHIVES AND HISTORY

Chapter 1. State Law Library; Legislative Reference Bureau 39-1-1
3. Libraries and Library Commission 39-3-1
5. Archives and History 39-5-1
7. Antiquities 39-7-1
9. Trusts to Promote Arts and Sciences 39-9-1
11. Mississippi Arts Commission 39-11-1
13. Historic Preservation Districts and Landmarks 39-13-1
15. Municipal and County Funds to Support the Arts 39-15-1
17. Mississippi Sports Hall of Fame and Dizzy Dean Museum 39-17-1
19. Museum Unclaimed Property Act 39-19-1
21. Mississippi Craft Center 39-21-1
23. Mississippi Children's Museum 39-23-1
25. Mississippi Arts and Entertainment Center 39-25-1
27. Mississippi Blues Commission 39-27-1
29. Mississippi Commission on the Holocaust 39-29-1
31. Mississippi Bicentennial Celebration Commission [Repealed effective July 1, 2019] 39-31-1
32. Mississippi Country and Western Music Commission 39-32-1
33. Mississippi Country Music Trail 39-33-1
35. Mississippi Sesquicentennial of the American Civil War Commission 39-35-1
37. Mississippi Heritage, History and Culture Trail Program 39-37-1

TITLE 39. LIBRARIES, ARTS, ARCHIVES AND HISTORY (Cont'd)

		Beginning Section
39.	Mississippi Civil Rights Museum Advisory Commission	39-39-1

TITLE 41. PUBLIC HEALTH

Chapter		Beginning Section
1.	Mississippi Department of Public Health [Repealed]	41-1-1
3.	State Board of Health; Local Health Boards and Officers	41-3-1
4.	Department of Mental Health	41-4-1
5.	Governing Authorities for State Hospitals and Institutions	41-5-1
7.	Hospital and Health Care Commissions	41-7-1
9.	Regulation of Hospitals; Hospital Records	41-9-1
10.	Medical Records	41-10-1
11.	State Charity Hospitals; Mississippi Children's Rehabilitation Center	41-11-1
13.	Community Hospitals	41-13-1
15.	Department for the Prevention of Insanity [Repealed]	41-15-1
17.	State Mental Institutions	41-17-1
19.	Facilities and Services for Individuals with an Intellectual Disability or Mental Illness	41-19-1
20.	Mental Health Accessibility	41-20-1
21.	Individuals with Mental Illness or an Intellectual Disability	41-21-1
22.	Hemophilia	41-22-1
23.	Contagious and Infectious Diseases; Quarantine	41-23-1
24.	Sickle Cell Testing Program	41-24-1
25.	Disinfection and Sanitation of Buildings and Premises	41-25-1
26.	Mississippi Safe Drinking Water Act of 1997	41-26-1
27.	Mosquito Control	41-27-1
28.	Diabetes	41-28-1
29.	Poisons, Drugs and Other Controlled Substances	41-29-1
30.	Alcoholism and Alcohol Abuse Prevention, Control and Treatment	41-30-1
31.	Commitment of Alcoholics and Drug Addicts for Treatment	41-31-1
32.	Commitment of Alcoholics and Drug Addicts to Private Treatment Facilities	41-32-1
33.	Tuberculosis and Respiratory Diseases; Tuberculosis Sanatorium	41-33-1

TITLE 41. PUBLIC HEALTH (Cont'd)

		Beginning Section
34.	Health Care Practice Requirements Pertaining to Transmission of Hepatitis B and HIV	41-34-1
35.	Eye Inflammation of Young	41-35-1
36.	Determination of Death	41-36-1
37.	Autopsies	41-37-1
39.	Disposition of Human Bodies or Parts	41-39-1
41.	Surgical or Medical Procedures; Consents	41-41-1
42.	Family Planning	41-42-1
43.	Cemeteries and Burial Grounds	41-43-1
45.	Sexual Sterilization [Repealed]	41-45-1
47.	Transportation and Possession of Parakeets and Other Birds [Repealed]	41-47-1
49.	Regulation of Hotels and Innkeepers	41-49-1
51.	Animal and Poultry By-Products Disposal or Rendering Plants	41-51-1
53.	Rabies Control in Dogs and Cats	41-53-1
55.	Public Ambulance Service	41-55-1
57.	Vital Statistics	41-57-1
58.	Medical Radiation Technology	41-58-1
59.	Emergency Medical Services	41-59-1
60.	Emergency Medical Technicians — Paramedics — Use of Automated External Defibrillator ..	41-60-1
61.	State Medical Examiner	41-61-1
63.	Evaluation and Review of Professional Health Services Providers	41-63-1
65.	[Reserved]	
67.	Mississippi Individual On-Site Wastewater Disposal System Law	41-67-1
69.	[Reserved]	
71.	Home Health Agencies	41-71-1
73.	Hospital Equipment and Facilities Authority Act	41-73-1
75.	Ambulatory Surgical Facilities	41-75-1
77.	Licensing of Birthing Centers	41-77-1
79.	Health Problems of School Children	41-79-1
81.	Perinatal Health Care	41-81-1
83.	Utilization Review of Availability of Hospital Resources and Medical Services	41-83-1
85.	Mississippi Hospice Law of 1995	41-85-1
86.	Mississippi Children's Health Care Insurance Program Act	41-86-1
87.	Early Intervention Act for Infants and Toddlers	41-87-1
88.	Mississippi Child Immunization Act of 1994	41-88-1
89.	Infant Mortality Reduction	41-89-1

TITLE 41. PUBLIC HEALTH (Cont'd)

Beginning Section
90. Hearing Impairment of Infants and Toddlers ... 41-90-1
91. Central Cancer Registry ... 41-91-1
93. Osteoporosis Prevention and Treatment Education Act ... 41-93-1
95. Mississippi Health Policy Act of 1994 ... 41-95-1
97. State Employee Wellness and Physical Fitness Programs ... 41-97-1
99. Qualified Health Center Grant Program ... 41-99-1
101. Mississippi Council on Obesity Prevention and Management ... 41-101-1
103. Task Force on Heart Disease and Stroke Prevention ... 41-103-1
105. Healthcare Coordinating Council ... 41-105-1
107. Health Care Rights of Conscience ... 41-107-1
109. Leonard Morris Chronic Kidney Disease Leadership Task Force ... 41-109-1
111. Child Death Review Panel ... 41-111-1
112. Maternal Mortality Review Committee ... 41-112-1
113. Tobacco Education, Prevention and Cessation Program ... 41-113-1
114. Restrictions on Tobacco Use in Public Facilities 41-114-1
115. Tanning Facilities ... 41-115-1
117. Nurse-Family Partnership Pilot Program ... 41-117-1
119. Health Information Technology Act ... 41-119-1
121. Requirements for Advertisements for Health Care Services ... 41-121-1
123. Office of Mississippi Physician Workforce ... 41-123-1
125. Prescribed Pediatric Extended Care Centers (PPEC) ... 41-125-1
127. Telemedicine Services ... 41-127-1
129. Umbilical Cord Blood Banking Program Act ... 41-129-1
131. Right to Try Act ... 41-131-1
133. Lay Caregivers for Hospital Patients ... 41-133-1
135. Support and Promotion of Breast-Feeding in Mississippi ... 41-135-1

TITLE 43. PUBLIC WELFARE

Chapter 1. Department of Human Services and County Departments of Public Welfare ... 43-1-1
3. Blind Persons ... 43-3-1
5. Schools for the Blind and Deaf ... 43-5-1
6. Rights and Liabilities of Persons with Disabilities ... 43-6-1

TITLE 43. PUBLIC WELFARE (Cont'd)

		Beginning Section
7.	Council on Aging	43-7-1
9.	Old Age Assistance	43-9-1
11.	Institutions for the Aged or Infirm	43-11-1
12.	Medicaid and Human Services Transparency and Fraud Prevention Act	43-12-1
13.	Medical Assistance for the Aged; Medicaid	43-13-1
14.	Mississippi Statewide System of Care for Children and Youth	43-14-1
15.	Child Welfare	43-15-1
16.	Child Residential Home Notification Act	43-16-1
17.	Temporary Assistance to Needy Families	43-17-1
18.	Interstate Compact on the Placement of Children	43-18-1
19.	Support of Natural Children	43-19-1
20.	Child Care Facilities	43-20-1
21.	Youth Court	43-21-1
23.	Family Courts [Repealed]	43-23-1
24.	State Central Registry of Child Abuse Reports; Wide Area Telephone Service for Reporting Child Abuse [Repealed]	43-24-1
25.	Interstate Compacts Relating to Juveniles	43-25-1
26.	Department of Child Protection Services	43-26-1
27.	Department of Youth Services	43-27-1
28.	Mississippi Achieving a Better Life Experience (ABLE) Act	43-28-1
29.	Persons with Disabilities	43-29-1
30.	Mississippi Disability Resource Commission	43-30-1
31.	Poor Persons	43-31-1
33.	Housing and Housing Authorities	43-33-1
35.	Urban Renewal and Redevelopment	43-35-1
37.	Acquisition of Real Property Using Public Funds	43-37-1
39.	Relocation Assistance	43-39-1
41.	Emergency and Disaster Assistance [Repealed]	43-41-1
43.	Administration of Social Security Funds	43-43-1
45.	Adult Protective Services [Repealed]	43-45-1
47.	Mississippi Vulnerable Persons Act	43-47-1
49.	Mississippi Welfare Restructuring Program Act of 1993 [Repealed]	43-49-1
51.	Family Preservation Act of 1994	43-51-1
53.	Mississippi Leadership Council on Aging	43-53-1
55.	Mississippi Commission for National and Community Service	43-55-1

TITLE 43. PUBLIC WELFARE (Cont'd)

Beginning Section

57. Comprehensive Plan for Provision of Services to Disabled Persons [Repealed] ....
59. Mississippi Commission on the Status of Women 43-59-1
61. Mississippi Seniors and Indigents Rx Program 43-61-1

TITLE 45. PUBLIC SAFETY AND GOOD ORDER

CHAPTER

1. Department of Public Safety 45-1-1
2. Law Enforcement Officers and Fire Fighters Death and Disability Benefits Trust Funds ... 45-2-1
3. Highway Safety Patrol 45-3-1
4. County Jail Officers Training Program 45-4-1
5. Law Enforcement Officers' Training Academy .. 45-5-1
6. Law Enforcement Officers Training Program ... 45-6-1
7. County Patrol Officers 45-7-1
9. Weapons 45-9-1
10. Novelty Lighters 45-10-1
11. Fire Protection Regulations, Fire Protection and Safety in Buildings 45-11-1
12. Mississippi Fire Safety Standard and Firefighter Protection Act [For contingent repeal of this chapter, see § 45-12-21] 45-12-1
13. Fireworks and Explosives 45-13-1
14. Radiation Protection Program 45-14-1
15. High Voltage Power Lines 45-15-1
17. Civil Emergencies 45-17-1
18. Emergency Management Assistance Compact .. 45-18-1
19. Subversive Groups and Subversive Activities ... 45-19-51
21. Rock Festivals 45-21-1
23. Boiler and Pressure Vessel Safety 45-23-1
25. Identification Cards for Non-Drivers. [Repealed] 45-25-1
27. Mississippi Justice Information Center 45-27-1
29. Records 45-29-1
31. Sex Offense Criminal History Record Information Act 45-31-1
33. Registration of Sex Offenders 45-33-1
35. Identification Cards 45-35-1
37. Prevention of Youth Access to Tobacco Act 45-37-1
39. Statewide Crime Stoppers Advisory Council 45-39-1
41. Mississippi Silver Alert System 45-41-1
43. William Lee Montjoy Pool Safety Act 45-43-1
45. Mississippi Conveyance Safety Act 45-45-1
47. DNA Data Bank 45-47-1

TITLE 45. PUBLIC SAFETY AND GOOD ORDER (Cont'd)

Beginning Section
49. Requirements for Operation of Amusement Rides 45-49-1

TITLE 47. PRISONS AND PRISONERS; PROBATION AND PAROLE

CHAPTER 1. County and Municipal Prisons and Prisoners .. 47-1-1
3. Removal of Prisoners 47-3-1
4. Privately Operated Correctional Facilities 47-4-1
5. Correctional System 47-5-1
7. Probation and Parole 47-7-1

TITLE 49. CONSERVATION AND ECOLOGY

CHAPTER 1. General Provisions 49-1-1
2. Department of Environmental Quality 49-2-1
3. Fisheries and Wildlife Research 49-3-1
4. Mississippi Department of Wildlife, Fisheries and Parks 49-4-1
5. Fish, Game and Bird Protection and Refuges ... 49-5-1
6. Motor Vehicle and Boat Replacement Program 49-6-1
7. Hunting and Fishing 49-7-1
8. Importation, Sale and Possession of Inherently Dangerous Wild Animals 49-8-1
9. Mussels 49-9-1
10. Wildlife Violator Compact 49-10-1
11. Private Shooting Preserves 49-11-1
13. Commercial Quail 49-13-1
15. Seafood 49-15-1
17. Pollution of Waters, Streams, and Air 49-17-1
18. Mississippi Liability of Persons Responding to Oil Spills Act 49-18-1
19. Forests and Forest Protection 49-19-1
20. Mississippi River Timberlands Control Act [Repealed] 49-20-1
21. Interstate Environmental Compact 49-21-1
23. Outdoor Advertising 49-23-1
25. Junkyards 49-25-1
26. Channel Maintenance Act 49-26-1
27. Coastal Wetlands Protection Act 49-27-1
28. Shoreline and Beach Preservation Districts 49-28-1
29. Environmental Protection Council [Repealed] .. 49-29-1
31. Mississippi Multimedia Pollution Prevention Act 49-31-1
33. Mississippi Agricultural and Forestry Activity Act 49-33-1

TITLE 49. CONSERVATION AND ECOLOGY (Cont'd)

Beginning Section

35. Mississippi Brownfields Voluntary Cleanup and Redevelopment; Remediation of Property on National Priorities List 49-35-1
37. Statewide Scientific Information Management 49-37-1

TITLE 51. WATERS, WATER RESOURCES, WATER DISTRICTS, DRAINAGE, AND FLOOD CONTROL

CHAPTER 1. Navigable Waters 51-1-1
2. Mississippi Marine Litter Act 51-2-1
3. Water Resources; Regulation and Control 51-3-1
4. Mississippi Scenic Streams Stewardship Act ... 51-4-1
5. Subsurface Waters; Well Drillers 51-5-1
7. Water Management Districts 51-7-1
8. Joint Water Management Districts 51-8-1
9. Development of Region Bordering Pearl River; Pearl River Valley Water Supply District; Metropolitan Area Water Supply Act 51-9-1
11. Pearl River Basin Development District 51-11-1
13. Tombigbee Valley Authority and Water Management District 51-13-1
15. Pat Harrison Waterway Commission and District 51-15-1
17. Big Black River Basin District 51-17-1
19. West Central Mississippi Waterway Commission [Repealed] 51-19-1
21. Lower Mississippi River Basin Development District [Repealed] 51-21-1
23. Lower Yazoo River Basin District. [Repealed] .. 51-23-1
25. Yellow Creek Watershed Authority 51-25-1
27. Tennessee-Tombigbee Waterway Compact 51-27-1
29. Drainage Districts with Local Commissioners 51-29-1
31. Drainage Districts with County Commissioners 51-31-1
33. Provisions Common to Drainage Districts and Swamp Land Districts 51-33-1
35. Flood Control 51-35-1
37. Watershed Districts 51-37-1
39. Storm Water Management Districts 51-39-1
41. Public Water Authorities 51-41-1

TITLE 53. OIL, GAS, AND OTHER MINERALS

CHAPTER 1. State Oil and Gas Board 53-1-1

TITLE 53. OIL, GAS, AND OTHER MINERALS (Cont'd)

Beginning Section
3. Development, Production and Distribution of Gas and Oil 53-3-1
5. Geological and Mineral Survey 53-5-1
7. Surface Mining and Reclamation of Land 53-7-1
9. Surface Coal Mining and Reclamation of Land 53-9-1
10. Interstate Mining Compact 53-10-1
11. Mississippi Geologic Sequestration of Carbon Dioxide Act 53-11-1

TITLE 55. PARKS AND RECREATION

CHAPTER 1. Mississippi Recreational Advisory Council [Repealed] 55-1-1
3. State Parks and Forests 55-3-1
5. Federal Parks and National Parkways 55-5-1
7. Bridge and Park Commissions 55-7-1
9. County and Municipal Facilities 55-9-1
11. Harrison County Parkway 55-11-1
13. Natchez Trace Parkway 55-13-1
15. Commemorative Parks and Monuments 55-15-1
17. International Gardens of Mississippi 55-17-1
19. Bienville Recreational District 55-19-1
21. Mississippi Zoological Park and Garden Districts 55-21-1
23. Mississippi Veterans Memorial Stadium 55-23-1
24. Mississippi Coast Coliseum Commission 55-24-1
25. Rails-to-Trails Recreational District 55-25-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT

CHAPTER 1. Mississippi Development Authority 57-1-1
3. Agriculture and Industry Program 57-3-1
4. Industrial Development Fund 57-4-1
5. Industrial Parks and Districts 57-5-1
7. Sale or Development of Airport Lands, or Other Lands, for Industrial Purposes 57-7-1
9. Industrial Plant Training 57-9-1
10. Small Business Assistance 57-10-1
11. Market and Industrial Studies and Research ... 57-11-1
13. Research and Development Center 57-13-1
15. Marine Resources 57-15-1
17. Forest Products Utilization Laboratory [Repealed] 57-17-1
18. Renewable Natural Resources Research Act of 1994 57-18-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

		Beginning Section
19.	Food Technology Laboratory	57-19-1
21.	State Chemical Laboratory	57-21-1
23.	Pharmaceutical Product Development and Utilization	57-23-1
25.	Southern States Energy Compact	57-25-1
26.	Tourism Project Incentive Program; Theme Parks, Entertainment Centers, Scenic Attractions, etc.	57-26-1
27.	Regional Tourist Promotion Councils	57-27-1
28.	Tourism Project Incentive Program; Entertainment Districts, etc.	57-28-1
29.	Travel and Tourism	57-29-1
30.	Family-Oriented Enterprises	57-30-1
31.	County Industrial Development Authorities	57-31-1
32.	Southeast Mississippi Industrial Council	57-32-1
33.	Southern Growth Policies Agreement	57-33-1
34.	Alabama-Mississippi Joint Economic Development Authority	57-34-1
35.	Tennessee River Valley Association	57-35-1
36.	Chickasaw Trail Economic Development Compact [Repealed]	57-36-1
37.	Transportation Planning Council [Repealed]	57-37-1
39.	Energy and Transportation Planning	57-39-1
40.	Energy Infrastructure Revolving Loan Program	57-40-1
41.	Financing Industrial Enterprise Projects	57-41-1
43.	Railroad Revitalization	57-43-1
44.	Local Governments Freight Rail Service Projects	57-44-1
45.	Mississippi-Louisiana-Alabama Rapid Rail Transit Compact	57-45-1
46.	Mississippi Railroad Improvements Fund	57-46-1
47.	Southeast Interstate Low-Level Radioactive Waste Management Compact	57-47-1
49.	Nuclear Waste Storage and Disposal	57-49-1
51.	Enterprise Zones [Repealed]	57-51-1
53.	Corporate Headquarters Incentive Program [Repealed]	57-53-1
54.	Advanced Technology Initiative [Repealed]	57-54-1
55.	Universities Research Institutes	57-55-1
56.	Mississippi Technology Transfer Office	57-56-1
57.	Export Trade Development	57-57-1
59.	Mississippi Capital Companies [Repealed]	57-59-1
61.	Mississippi Business Investment Act	57-61-1
62.	Mississippi Advantage Jobs Act	57-62-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

Beginning Section

63. Statewide Economic Development and Planning Act 57-63-1
64. Regional Economic Development 57-64-1
65. Mississippi International Trade Institute 57-65-1
67. Mississippi Superconducting Super Collider Act 57-67-1
69. Mississippi Minority Business Enterprise Act .. 57-69-1
71. Mississippi Small Enterprise Development Finance Act 57-71-1
73. Economic Development Reform Act 57-73-1
75. Mississippi Major Economic Impact Act 57-75-1
77. Venture Capital Act of 1994 57-77-1
79. Mississippi Small Town Development Act 57-79-1
80. Growth and Prosperity Act 57-80-1
81. Mississippi Science and Technology Commission [Repealed] 57-81-1
83. Mississippi Technology, Inc. Liaison Committee 57-83-1
85. Mississippi Rural Impact Act 57-85-1
87. Mississippi Broadband Technology Development Act 57-87-1
89. Mississippi Motion Picture Incentive Act 57-89-1
91. Economic Redevelopment Act 57-91-1
93. Mississippi Existing Industry Productivity Loan Program 57-93-1
95. Mississippi Job Protection Act 57-95-1
97. Mississippi Delta Revitalization Act of 2006 57-97-1
99. Mississippi Major Economic Impact Withholding Rebate Incentive Program 57-99-1
100. Existing Industry Withholding Rebate Incentive Program 57-100-1
101. Mississippi Major Economic Impact Authority Component Construction Material Costs Rebate Program 57-101-1
103. Technology Based Business Capital Assistance Programs 57-103-1
105. Qualified Equity Investment Tax Credits and Public Entity Financing Arrangements 57-105-1
107. Mississippi Workforce Training Projects 57-107-1
111. Mississippi Small Business and Existing Forestry Industry Enterprise Participating Loan Program 57-111-1
113. Business Enterprise Tax Exemptions 57-113-1
115. Mississippi Small Business Investment Company Act 57-115-1

TITLE 57. PLANNING, RESEARCH AND DEVELOPMENT (Cont'd)

		Beginning Section
117.	Mississippi Health Care Industry Zone Act [Repealed effective July 1, 2022]	57-117-1
119.	Gulf Coast Restoration Fund	57-119-1
121.	2020 COVID-19 Mississippi Business Assistance Act	57-121-1
123.	Coronavirus Recovery Funds	57-123-1

TITLE 59. PORTS, HARBORS, LANDINGS AND WATERCRAFT

CHAPTER 1.	Harbor or Port Commissions; Powers of Political Subdivision; Pilotage	59-1-1
3.	Ports of Entry	59-3-1
5.	State Ports and Harbors	59-5-1
6.	Compact for Development of Deep Draft Harbor and Terminal	59-6-1
7.	County and Municipal Harbors	59-7-1
9.	County Port Authority or Development Commission	59-9-1
11.	County Port and Harbor Commission	59-11-1
13.	Harbor Improvements by Coast Counties	59-13-1
15.	Small Craft Harbors	59-15-1
17.	State Inland Ports	59-17-1
19.	Landings	59-19-1
21.	Boats and Other Vessels	59-21-1
23.	Alcohol Boating Safety Act	59-23-1
25.	Certificates of Title for Boats and Other Vessels	59-25-1

TITLE 61. AVIATION

CHAPTER 1.	Transportation Commission	61-1-1
3.	Airport Authorities	61-3-1
4.	Mississippi Wayport Authority Act	61-4-1
5.	Acquisition, Disposition and Support of Airport Facilities	61-5-1
7.	Airport Zoning	61-7-1
9.	Incorporation of Airport Into Corporate Boundaries of Municipality	61-9-1
11.	Operation of Aircraft; Certification and Licensing of Pilots and Aircraft	61-11-1
13.	Aircraft for Use of Governor, State Departments and Agencies	61-13-1
15.	Registration of Aircraft	61-15-1
17.	Concealing or Misrepresenting Aircraft Identification Number; Non-Conforming Aircraft Fuel Containers	61-17-1

TITLE 61. AVIATION (Cont'd)

Beginning Section
19. Aviation Hazards 61-19-1

TITLE 63. MOTOR VEHICLES AND TRAFFIC REGULATIONS

CHAPTER 1. Driver's License 63-1-1
2. Mandatory Use of Safety Seat Belts 63-2-1
3. Traffic Regulations and Rules of the Road 63-3-1
5. Size, Weight and Load 63-5-1
7. Equipment and Identification 63-7-1
9. Traffic Violations Procedure 63-9-1
10. Nonresident Traffic Violator Compact 63-10-1
11. Implied Consent Law 63-11-1
13. Inspection of Motor Vehicles 63-13-1
15. Motor Vehicle Safety — Responsibility 63-15-1
16. Public Safety Verification and Enforcement Act [Repealed effective July 1, 2022] 63-16-1
17. Manufacture, Sales and Distribution 63-17-1
19. Motor Vehicle Sales Finance Law 63-19-1
21. Motor Vehicle Titles 63-21-1
23. Abandoned Motor Vehicles 63-23-1
25. Motor Vehicle Chop Shop, Stolen and Altered Property Act 63-25-1
27. Disclosure of Use of Nonoriginal Replacement Parts 63-27-1
29. Mississippi Vehicle Protection Product Act 63-29-1
31. Operating Off-Road Vehicles 63-31-1
33. Miscellaneous Provisions 63-33-1

TITLE 65. HIGHWAYS, BRIDGES AND FERRIES

CHAPTER 1. Transportation Department 65-1-1
2. State Transportation Arbitration Board 65-2-1
3. State Highway System 65-3-1
4. Economic Development Highway Act 65-4-1
5. Controlled Access Facilities 65-5-1
7. Public Roads and Streets; Private Way 65-7-1
9. State Aid Roads in Counties 65-9-1
10. County Major Feeder Road System [Repealed] 65-10-1
11. County Highway Aid 65-11-1
13. Highway and Street Revenue Bond Authority 65-13-1
15. County Funds for Roads and Bridges 65-15-1
17. County Road Officials 65-17-1
18. Local System Road Program 65-18-1

TITLE 65. HIGHWAYS, BRIDGES AND FERRIES (Cont'd)

Beginning Section
19. Separate Road Districts 65-19-1
21. Bridges; General Provisions 65-21-1
23. Bridges; Boundary and Other Waters 65-23-1
25. Mississippi River Bridges 65-25-1
26. Tennessee-Tombigbee Waterway Bridges 65-26-1
27. Ferries; General Provisions 65-27-1
29. Ferries in Certain Counties 65-29-1
31. Hospitality Stations on Highways 65-31-1
33. Sea Walls 65-33-1
37. Local System Bridge Replacement and Rehabilitation Program 65-37-1
39. Gaming Counties Bond Sinking Fund 65-39-1
41. Mississippi Scenic Byways 65-41-1
43. Toll Roads and Toll Bridges 65-43-1

TITLE 67. ALCOHOLIC BEVERAGES

CHAPTER 1. Local Option Alcoholic Beverage Control 67-1-1
3. Sale of Light Wine, Beer, and Other Alcoholic Beverages 67-3-1
5. Native Wines 67-5-1
7. Beer Industry Fair Dealing Act 67-7-1
9. Possession or Transportation of Alcoholic Beverages, Light Wine, or Beer 67-9-1

TITLE 69. AGRICULTURE, HORTICULTURE, AND ANIMALS

CHAPTER 1. Agriculture and Commerce Department; Council on Agriculture 69-1-1
2. Mississippi Farm Reform Act 69-2-1
3. Agricultural Seeds 69-3-1
5. Fairs; Stock Shows; Improvement of Livestock 69-5-1
7. Markets and Marketing; Domestic Fish Farming 69-7-1
8. Beef Promotion And Research Program ....
9. Soybean Promotion Board 69-9-1
10. Rice Promotion Board 69-10-1
11. Swine 69-11-1
13. Stock Laws, Estrays 69-13-1
15. Board of Animal Health; Livestock and Animal Diseases 69-15-1
17. Livestock Biologics, Drugs and Vaccines 69-17-1
19. Regulation of Professional Services 69-19-1
21. Crop Spraying and Licensing of Aerial Applicators 69-21-1

TITLE 69. AGRICULTURE, HORTICULTURE, AND ANIMALS (Cont'd)

Beginning Section

23. Mississippi Pesticide Law 69-23-1
24. Fertilizing Materials and Additives 69-24-1
25. Plants, Plant and Bee Diseases 69-25-1
26. Pest Control Compact 69-26-1
27. Soil Conservation 69-27-1
28. Protection and Conservation of Agricultural Lands 69-28-1
29. Livestock Brands, Theft or Loss of Livestock and Protective Associations 69-29-1
31. Regulation of Moisture-Measuring Devices 69-31-1
33. Pecan Harvesting 69-33-1
34. Milk Producers Transportation Cost Assistance Loan Program 69-34-1
35. Mississippi Dairy Promotion Act 69-35-1
36. Southern Dairy Compact 69-36-1
37. Mississippi Boll Weevil Management Act 69-37-1
39. Agricultural Liming Materials 69-39-1
41. Mississippi Agribusiness Council Act of 1993 ... 69-41-1
42. Program to Encourage Growth in Mississippi Agribusiness Industry 69-42-1
43. Mississippi Ratite Council and Promotion Board 69-43-1
44. Mississippi Corn Promotion Board 69-44-1
45. Mississippi Agricultural Promotions Program Act 69-45-1
46. Mississippi Land, Water and Timber Resources Act 69-46-1
47. Organic Certification Program 69-47-1
48. Peanut Promotion Board 69-48-1
49. Field Crop Products 69-49-1
51. Ethanol, Anhydrous Alcohol and Wet Alcohol ... 69-51-1
53. Agritourism [Repealed effective July 1, 2018] .. 69-53-1

TITLE 71. LABOR AND INDUSTRY

CHAPTER 1. Employer and Employee 71-1-1
3. Workers' Compensation 71-3-1
5. Unemployment Compensation 71-5-1
7. Drug and Alcohol Testing of Employees 71-7-1
9. Medical Savings Account Act 71-9-1
11. Employment Protection Act 71-11-1
13. Prohibition Against Employer Intimidation Act 71-13-1
15. Mississippi Employment Fairness Act 71-15-1

TITLE 73. PROFESSIONS AND VOCATIONS

			Beginning Section
CHAPTER	1.	Architects	73-1-1
	2.	Landscape Architectural Practice	73-2-1
	3.	Attorneys at Law	73-3-1
	4.	Auctioneers	73-4-1
	5.	Barbers	73-5-1
	6.	Chiropractors	73-6-1
	7.	Cosmetologists	73-7-1
	9.	Dentists	73-9-1
	10.	Dietitians	73-10-1
	11.	Practice of Funeral Service and Funeral Directing	73-11-1
	13.	Engineers and Land Surveyors	73-13-1
	14.	Hearing Aid Dealers	73-14-1
	15.	Nurses	73-15-1
	17.	Nursing Home Administrators	73-17-1
	19.	Optometry and Optometrists	73-19-1
	21.	Pharmacists	73-21-1
	22.	Orthotics and Prosthetics	73-22-1
	23.	Physical Therapists	73-23-1
	24.	Mississippi Occupational Therapy Practice Act	73-24-1
	25.	Physicians	73-25-1
	26.	Physician Assistants	73-26-1
	27.	Podiatrists	73-27-1
	29.	Polygraph Examiners	73-29-1
	30.	Licensed Professional Counselors	73-30-1
	31.	Psychologists	73-31-1
	33.	Public Accountants	73-33-1
	34.	Real Estate Appraisers	73-34-1
	35.	Real Estate Brokers	73-35-1
	36.	Registered Foresters	73-36-1
	37.	Sanitarians	73-37-1
	38.	Speech Pathologists and Audiologists	73-38-1
	39.	Veterinarians	73-39-1
	41.	Athlete Agents [Repealed]	73-41-1
	42.	Uniform Athlete Agents Law	73-42-1
	43.	State Board of Medical Licensure	73-43-1
	45.	Information to Be Included in Prescriptions	73-45-1
	47.	Occupational Board Compliance Act of 2017	73-47-1
	49.	Health Care Provider Licensing Boards	73-49-1
	50.	Licensing, Certifying or Registering Military-trained Individuals or Spouses to Lawfully Practice Occupation	73-50-1

TITLE 73. PROFESSIONS AND VOCATIONS (Cont'd)

Beginning Section

51. Unlicensed Practice of Profession 73-51-1
52. Licensure Records 73-52-1
53. Licensing and Regulation of Social Workers 73-53-1
54. Marriage and Family Therapists 73-54-1
55. Mississippi Athletic Trainers Licensure Act 73-55-1
57. Mississippi Respiratory Care Practice Act 73-57-1
59. Residential Builders and Remodelers 73-59-1
60. Home Inspectors 73-60-1
61. Tattooing and Body Piercing 73-61-1
63. Registered Professional Geologists Practice Act 73-63-1
65. Professional Art Therapists 73-65-1
67. Professional Massage Therapists 73-67-1
69. Mississippi Electronic Protection Licensing Act 73-69-1
71. Acupuncture Practice Act 73-71-1
73. Mississippi Certified Interior Designer Act 73-73-1
75. Licensed Behavior Analysts 73-75-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS

CHAPTER 1. Uniform Commercial Code — Revised Article 1. General Provisions 75-1-101
2. Uniform Commercial Code — Sales 75-2-101
2A. Uniform Commercial Code — Leases 75-2A-101
3. Uniform Commercial Code — Negotiable Instruments 75-3-101
4. Uniform Commercial Code—Bank Deposits and Collections 75-4-101
4A. Uniform Commercial Code—Funds Transfers .. 75-4A-101
5. Uniform Commercial Code—Revised Article 5. Letters of Credit 75-5-101
6. Uniform Commercial Code—Bulk Transfers 75-6-101
7. Uniform Commercial Code—Documents of Title 75-7-101
8. Uniform Commercial Code—Revised Article 8. Investment Securities 75-8-101
9. Uniform Commercial Code—Secured Transactions 75-9-101
10. Uniform Commercial Code—Effective Date and Repealer 75-10-101
11. Uniform Commercial Code—Effective Date and Transition Provisions: 1977 Amendments 75-11-101
12. Uniform Electronic Transactions Act 75-12-1
13. Bills, Notes and Other Writings 75-13-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS (Cont'd)

		Beginning Section
15.	Mississippi Money Transmitters Act	75-15-1
17.	Interest, Finance Charges, and Other Charges	75-17-1
18.	Revolving Charge Agreements; Credit Cards [Repealed]	75-18-1
19.	Seals	75-19-1
21.	Trusts and Combines in Restraint or Hindrance of Trade	75-21-1
23.	Fair Trade Laws	75-23-1
24.	Regulation of Business for Consumer Protection	75-24-1
25.	Registration of Trademarks and Labels	75-25-1
26.	Mississippi Uniform Trade Secrets Act	75-26-1
27.	Weights and Measures	75-27-1
29.	Sale and Inspection of Food and Drugs	75-29-1
31.	Milk and Milk Products	75-31-1
33.	Meat, Meat-Food and Poultry Regulation and Inspection	75-33-1
35.	Meat Inspection	75-35-1
37.	Operation of Frozen Food Locker Plants [Repealed]	75-37-1
39.	Sale of Baby Chicks	75-39-1
40.	Importation and Sale of Animals or Birds	75-40-1
41.	Gins	75-41-1
43.	Farm Warehouses	75-43-1
44.	Grain Warehouses	75-44-1
45.	Commercial Feeds and Grains	75-45-1
47.	Commercial Fertilizers	75-47-1
49.	Factory-Built Homes	75-49-1
51.	Water Heaters	75-51-1
53.	Paints, Varnishes and Similar Materials	75-53-1
55.	Gasoline and Petroleum Products	75-55-1
56.	Antifreeze and Summer Coolants	75-56-1
57.	Liquefied Petroleum Gases	75-57-1
58.	Mississippi Natural Gas Marketing Act	75-58-1
59.	Correspondence Courses	75-59-1
60.	Proprietary Schools and Colleges	75-60-1
61.	Manufacture and Sale of Jewelry and Optical Equipment	75-61-1
63.	Sales of Cemetery Merchandise and Funeral Services	75-63-1
65.	Going Out of Business Sales; Unsolicited Goods	75-65-1
66.	Home Solicitation Sales	75-66-1
67.	Loans	75-67-1

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS (Cont'd)

Beginning Section
69. Farm Loan Bonds 75-69-1
71. Mississippi Securities Act of 2010 75-71-101
72. Business Takeovers 75-72-1
73. Hotels and Innkeepers 75-73-1
74. Youth Camps 75-74-1
75. Amusements, Exhibitions and Athletic Events 75-75-1
76. Mississippi Gaming Control Act 75-76-1
77. Repurchase of Inventories From Retailers Upon Termination of Contract 75-77-1
79. Pulpwood Scaling and Practices 75-79-1
81. Dance Studio Lessons 75-81-101
83. Health Spas 75-83-1
85. Transient Vendor 75-85-1
87. Contracts Between Out-of-State Principals and Commissioned Sales Representatives 75-87-1
89. Mississippi Commodities Enforcement Act 75-89-1
91. Truth in Music Advertising 75-91-1
93. Fictitious Business Name Registration Act 75-93-1
95. Business of Purchasing Precious Items for Resale 75-95-1

TITLE 77. PUBLIC UTILITIES AND CARRIERS

CHAPTER 1. Public Service Commission 77-1-1
2. Public Utilities Staff 77-2-1
3. Regulation of Public Utilities 77-3-1
5. Electric Power 77-5-1
6. Municipal Gas Authority of Mississippi Law 77-6-1
7. Motor Carriers 77-7-1
8. Transportation Network Companies 77-8-1
9. Railroads and Other Common Carriers 77-9-1
11. Gas Pipelines and Distribution Systems 77-11-1
13. Regulation of Excavations Near Underground Utility Facilities 77-13-1
15. Local Natural Gas Districts 77-15-1
17. Mississippi Broadband Enabling Act 77-17-1

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS

CHAPTER 1. General Provisions Relative to Corporations 79-1-1
3. Business Corporations [Repealed] 79-3-1
4. Mississippi Business Corporation Act 79-4-1.01

TITLE 79. CORPORATIONS, ASSOCIATIONS, AND PARTNERSHIPS (Cont'd)

Beginning Section
5. Business Development Corporations [Repealed] 79-5-1
6. Foreign Limited Liability Companies [Repealed] 79-6-1
7. Small Business Investment Companies 79-7-1
9. Professional Corporations [Repealed] 79-9-1
10. Mississippi Professional Corporation Act 79-10-1
11. Nonprofit, Nonshare Corporations and Religious Societies 79-11-1
12. Partnerships [Repealed] 79-12-1
13. Uniform Partnership Act (1997) 79-13-101
14. Mississippi Uniform Limited Partnership Act .. 79-14-101
15. Investment Trusts 79-15-1
16. Mississippi Registration of Foreign Business Trusts Act 79-16-1
17. Agricultural Associations; Conversion to Corporate Form 79-17-1
19. Agricultural Cooperative Marketing Associations 79-19-1
21. Aquatic Products Marketing Association 79-21-1
22. Mississippi Aquaculture Act of 1988 79-22-1
23. Commercial and Proprietary Information 79-23-1
25. Mississippi Shareholder Protection Act 79-25-1
27. Mississippi Control Share Act 79-27-1
29. Revised Mississippi Limited Liability Company Act 79-29-101
31. Mississippi Registration of Foreign Limited Liability Partnerships Act [Repealed] 79-31-1
33. Corporate Successor Asbestos-Related Liability in Connection with Mergers or Consolidations 79-33-1
35. The Mississippi Registered Agents Act 79-35-1
37. Mississippi Entity Conversion and Domestication Act 79-37-101
13. Uniform Partnership Act (1997) 79-13-101

TITLE 81. BANKS AND FINANCIAL INSTITUTIONS

CHAPTER
1. Department of Banking and Consumer Finance 81-1-1
3. Incorporation and Organization of Banks 81-3-1
5. General Provisions Relating to Banks and Banking 81-5-1
7. Branch Banks 81-7-1
8. Regional Banking Institutions 81-8-1
9. Insolvent Banks 81-9-1

TITLE 81. BANKS AND FINANCIAL INSTITUTIONS (Cont'd)

Beginning Section

11. Savings and Loan Associations [Repealed] 81-11-1
12. Savings Associations Law 81-12-1
13. Credit Unions 81-13-1
14. Savings Bank Law 81-14-1
15. Mississippi Rural Credit Law 81-15-1
17. Farmers' Credit Associations 81-17-1
18. Mississippi S.A.F.E. Mortgage Act 81-18-1
19. Consumer Loan Broker Act 81-19-1
20. Consumer Complaints and Disputes Against Mortgage Companies 81-20-1
21. Insurance Premium Finance Companies 81-21-1
22. Mississippi Debt Management Services Act 81-22-1
23. Interstate Bank Branching 81-23-1
25. The Mississippi International Banking Act 81-25-1
27. Multistate, State and Limited Liability Trust Institutions 81-27-1.001
29. Lender Trade Name and Trademark Use 81-29-1

TITLE 83. INSURANCE

Chapter 1. Department of Insurance 83-1-1
2. Competitive Rating for Property and Casualty Insurance 83-2-1
3. Commissioner of Insurance, Rating Bureau and Rates 83-3-1
5. General Provisions Relative to Insurance and Insurance Companies 83-5-1
6. Registration and Examination of Insurers 83-6-1
7. Life Insurance 83-7-1
9. Accident, Health and Medicare Supplement Insurance 83-9-1
11. Automobile Insurance 83-11-1
13. Fire Insurance 83-13-1
14. Homeowners' and Farmowners' Insurance [Repealed] 83-14-1
15. Title Insurance 83-15-1
17. Insurance Agents, Solicitors, or Adjusters 83-17-1
18. Insurance Administrators and Managing General Agents 83-18-1
19. Domestic Companies 83-19-1
20. Domicile Change for Domestic and Foreign Insurers 83-20-1
21. Foreign Companies 83-21-1

TITLE 83. INSURANCE (Cont'd)

		Beginning Section
22.	Mississippi Uniform Disclaimer of Property Interests Act (2002/2010)‘	
23.	Insolvent Insurance Companies; Insurance Guaranty Association	83-23-1
24.	Insurers Rehabilitation and Liquidation Act	83-24-1
25.	Co-operative Insurance	83-25-1
27.	Surety Companies	83-27-1
29.	Fraternal Societies	83-29-1
30.	Larger Fraternal Benefit Societies	83-30-1
31.	Mutual Companies	83-31-1
33.	Reciprocal Insurance	83-33-1
34.	Windstorm Underwriting Association	83-34-1
35.	Underwriting Association [Repealed]	83-35-1
36.	Joint Underwriting Association for Medical Malpractice Insurance	83-36-1
37.	Burial Associations	83-37-1
38.	Mississippi Residential Property Insurance Underwriting Association Law	83-38-1
39.	Bail Bonds and Bondsmen	83-39-1
41.	Hospital and Medical Service Associations and Contracts	83-41-1
43.	Nonprofit Dental Service Corporations	83-43-1
45.	Nonprofit, Community Service Blood Supply Plans	83-45-1
47.	Nonprofit Medical Liability Insurance Corporations	83-47-1
48.	Medical Malpractice Insurance Availability Act	83-48-1
49.	Legal Expense Insurance	83-49-1
51.	Dental Care Benefits	83-51-1
52.	Guaranteed Asset Protection Waivers	83-52-1
53.	Credit Life and Credit Disability Insurance	83-53-1
54.	Mississippi Creditor-Placed Insurance Act	83-54-1
55.	Risk Retention Act	83-55-1
57.	Home Warranties [Repealed].	83-57-1
58.	New Home Warranty Act	83-58-1
59.	Business Transacted With Producer Controlled Insurer Act	83-59-1
61.	Voluntary Basic Health Insurance Coverage Law	83-61-1
62.	Health Savings Accounts	83-62-1
63.	Small Employer Health Benefit Plans	83-63-1
64.	Health Discount Plans	83-64-1
65.	Regulation of Vehicle Service Contracts	83-65-101

TITLE 83. INSURANCE (Cont'd)

Beginning Section

67. Utilization of Modern Systems for Holding and Transferring Securities Without Physical Delivery 83-67-1
69. Interstate Insurance Product Regulation Compact 83-69-1
71. Unfair Discrimination Against Subjects of Abuse in Health, Life, and Disability Income Insurance 83-71-1
73. Portable Electronics Insurance 83-73-1
75. Homeowners Insurance Discount for Hurricane or Windstorm Damage Mitigation 83-75-1
77. Health Care Sharing Ministries 83-77-1
79. Property Insurance Clarity Act 83-79-1
81. Mississippi Direct Primary Care Act 83-81-1
83. Limited Lines Travel Insurance Act 83-83-1
85. Own Risk and Solvency Assessment Act 83-85-1

TITLE 85. DEBTOR-CREDITOR RELATIONSHIP

CHAPTER 1. Assignment for Benefit of Creditors 85-1-1
3. Exempt Property 85-3-1
5. Joint and Several Debtors 85-5-1
7. Liens 85-7-1
8. Uniform Federal Lien Registration Act 85-8-1
9. Debt Adjusting or Credit Arranging [Repealed]. 85-9-1
11. Mississippi Uniform State Tax Lien Registration Act 85-11-1
13. Automated Data Match System for Identifying and Seizing Financial Assets of Obligors Identified by Department of Revenue 85-13-1

TITLE 87. CONTRACTS AND CONTRACTUAL RELATIONS

CHAPTER 1. Gambling and Future Contracts 87-1-1
3. Power and Letters of Attorney 87-3-1
5. Principal and Surety 87-5-1
7. Improvements to Real Property 87-7-1
9. General Provisions 87-9-1

TITLE 89. REAL AND PERSONAL PROPERTY

CHAPTER 1. Land and Conveyances 89-1-1
2. Liability of Recreational Landowners 89-2-1
3. Acknowledgments 89-3-1

TITLE 89. REAL AND PERSONAL PROPERTY (Cont'd)

Beginning Section

5. Recording of Instruments 89-5-1
6. Mississippi Plane Coordinate System 89-6-1
7. Landlord and Tenant 89-7-1
8. Residential Landlord and Tenant Act 89-8-1
9. Condominiums 89-9-1
11. Escheats 89-11-1
12. Uniform Disposition of Unclaimed Property Act 89-12-1
13. Party Fences 89-13-1
15. Party Walls 89-15-1
17. Salvage 89-17-1
19. Mississippi Conservation Easements 89-19-1
21. Uniform Disclaimer of Property Interests Act .. 89-21-1
22. Mississippi Uniform Disclaimer of Property Interests Act (2002/2010) 89-22-1
23. Mississippi Uniform Environmental Covenants Act 89-23-1
25. Mississippi Uniform Statutory Rule Against Perpetuities 89-25-1

TITLE 91. TRUSTS AND ESTATES

CHAPTER 1. Descent and Distribution 91-1-1
3. Uniform Simultaneous Death Law 91-3-1
5. Wills and Testaments 91-5-1
7. Executors and Administrators 91-7-1
8. Mississippi Uniform Trust Code 91-8-101
9. Trusts and Trustees 91-9-1
11. Fiduciary Security Transfers 91-11-1
13. Fiduciary Investments 91-13-1
15. Release of Powers of Appointment 91-15-1
17. Mississippi Principal and Income Act of 2013 .. 91-17-101
19. Gifts to Minors [Repealed] 91-19-1
20. Transfers to Minors 91-20-1
21. Uniform Transfer-on-Death Security Registration Act 91-21-1
23. Revised Uniform Fiduciary Access to Digital Assets Act 91-23-1
25. Mississippi Uniform Estate Tax Apportionment Act 91-25-1
27. Mississippi Real Property Transfer-On-Death Act 91-27-1
29. Effect of Dissolution of Marriage 91-29-1
31. Uniform Partition of Heir Property 91-31-1

TITLE 93. DOMESTIC RELATIONS

Beginning Section

CHAPTER 1. Marriage 93-1-1
3. Husband and Wife 93-3-1
5. Divorce and Alimony 93-5-1
7. Annulment of Marriage 93-7-1
9. Bastardy 93-9-1
11. Enforcement of Support of Dependents 93-11-1
12. Enforcement of Child Support Orders from Foreign Jurisdictions 93-12-1
13. Guardians and Conservators 93-13-1
14. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act 93-14-101
15. Mississippi Termination of Parental Rights Law 93-15-1
16. Grandparents' Visitation Rights 93-16-1
17. Adoption, Change of Name, and Legitimation of Children 93-17-1
19. Removal of Disability of Minority 93-19-1
20. Guardianship and Conservatorship 93-20-101
21. Protection from Domestic Abuse 93-21-1
22. Uniform Interstate Enforcement of Domestic Violence Protection Orders 93-22-1
23. Uniform Child Custody Jurisdiction Act [Repealed] 93-23-1
25. Uniform Interstate Family Support Act 93-25-1
27. Uniform Child Custody Jurisdiction and Enforcement Act 93-27-101
29. Uniform Child Abduction Prevention Act 93-29-1
31. Supporting and Strengthening Families Act 93-31-1

TITLE 95. TORTS

CHAPTER 1. Libel and Slander 95-1-1
3. Nuisances 95-3-1
5. Trespass 95-5-1
7. Liability Exemption for Donors of Food 95-7-1
9. Liability Exemption for Volunteers and Sports Officials 95-9-1
11. Liability Exemption for Equine and Livestock Activities 95-11-1
13. Liability Exemption for Noise Pollution by Sport-shooting Ranges 95-13-1
15. Liability Exemption for Report of Suspicious Activity or Behavior 95-15-1

TITLE 97. CRIMES

Beginning Section

CHAPTER 1. Conspiracy, Accessories and Attempts 97-1-1
3. Crimes Against the Person 97-3-1
5. Offenses Affecting Children 97-5-1
7. Crimes Against Sovereignty or Administration of Government 97-7-1
9. Offenses Affecting Administration of Justice 97-9-1
11. Offenses Involving Public Officials 97-11-1
13. Election Crimes 97-13-1
15. Offenses Affecting Highways, Ferries and Waterways 97-15-1
17. Crimes Against Property 97-17-1
19. False Pretenses and Cheats 97-19-1
21. Forgery and Counterfeiting 97-21-1
23. Offenses Affecting Trade, Business and Professions 97-23-1
25. Offenses Affecting Railroads, Public Utilities and Carriers 97-25-1
27. Crimes Affecting Public Health 97-27-1
29. Crimes Against Public Morals and Decency 97-29-1
31. Intoxicating Beverage Offenses 97-31-1
32. Tobacco Offenses 97-32-1
33. Gambling and Lotteries 97-33-1
35. Crimes Against Public Peace and Safety 97-35-1
37. Weapons and Explosives 97-37-1
39. Dueling 97-39-1
41. Cruelty to Animals 97-41-1
43. Racketeer Influenced and Corrupt Organization Act (RICO) 97-43-1
44. Mississippi Streetgang Act 97-44-1
45. Computer Crimes and Identity Theft 97-45-1

TITLE 99. CRIMINAL PROCEDURE

CHAPTER 1. General Provisions; Time Limitations; Costs ... 99-1-1
3. Arrests 99-3-1
5. Bail 99-5-1
7. Indictment 99-7-1
9. Process 99-9-1
11. Jurisdiction and Venue 99-11-1
13. Insanity Proceedings 99-13-1
15. Pretrial Proceedings 99-15-1
17. Trial 99-17-1
18. Office of State Public Defender 99-18-1

TITLE 99. CRIMINAL PROCEDURE (Cont'd)

Beginning Section

19. Judgment, Sentence, and Execution 99-19-1
20. Community Service Restitution 99-20-1
21. Fugitives From Other States 99-21-1
23. Peace Bonds 99-23-1
25. Forms 99-25-1
27. Proceedings for Intoxicating Beverage Offenses 99-27-1
29. Vagrancy Proceedings 99-29-1
31. Obscene Publications Proceedings [Repealed] .. 99-31-1
33. Prosecutions Before Justice Court Judges 99-33-1
35. Appeals 99-35-1
36. Victim Assistance Coordinator 99-36-1
37. Restitution to Victims of Crimes 99-37-1
38. Crime Victim's Escrow Account Act 99-38-1
39. Post-Conviction Proceedings 99-39-1
40. Indigent Appeals Division 99-40-1
41. Mississippi Crime Victims' Compensation Act .. 99-41-1
43. Mississippi Crime Victims' Bill of Rights 99-43-1
45. Statewide Automated Victim Information and Notification System 99-45-1
47. Victim of Domestic Violence, Sexual Assault or Stalking Address Confidentiality Program 99-47-1
49. Preservation and Accessibility of Biological Evidence 99-49-1

MISSISSIPPI CODE
1972
ANNOTATED

VOLUME TWENTY-TWO

TITLE 99.

CRIMINAL PROCEDURE

Chapter 1. General Provisions; Time Limitations; Costs. ... 99-1-1
Chapter 3. Arrests. 99-3-1
Chapter 5. Bail. 99-5-1
Chapter 7. Indictment. 99-7-1
Chapter 9. Process. 99-9-1
Chapter 11. Jurisdiction and Venue. 99-11-1
Chapter 13. Insanity Proceedings. 99-13-1
Chapter 15. Pretrial Proceedings. 99-15-1
Chapter 17. Trial. 99-17-1
Chapter 18. Office of State Public Defender. 99-18-1
Chapter 19. Judgment, Sentence, and Execution. 99-19-1

CHAPTER 1.

GENERAL PROVISIONS; TIME LIMITATIONS; COSTS

Sec.
99-1-1. Applicability of statutes relating to procedure and appeals generally.
99-1-3. Common-law offenses recognized.
99-1-5. Time limitation on prosecutions.
99-1-7. Time limitation on prosecutions; commencement of prosecution.
99-1-9. Time limitation on prosecutions; additional year allowed in certain cases.
99-1-11. Costs of search warrant and certain criminal prosecutions.
99-1-13 and 99-1-15. Repealed.
99-1-17 through 99-1-21. Repealed.
99-1-23. Appearance in court by means of closed circuit television or Web cam.
99-1-25. Entrapment; affirmative defense to criminal prosecution; burden of proof.
99-1-27. Victim of sex offenses not required to submit to truth telling devices as condition for proceeding with investigation of offense.
99-1-29. Certain reproduction during discovery of property or material that constitutes child pornography prohibited.

§ 99-1-1. Applicability of statutes relating to procedure and appeals generally.

All statutes of this state relating to practice and procedure and appeals which, prior to the adoption of this Mississippi Code of 1972, were applicable to criminal cases shall continue to be applicable to criminal cases in the same manner and to the same extent as before, notwithstanding the classification and arrangement of such statutes in this code.

HISTORY: [No history available for this section.]

Cross References — Rights of accused in criminal prosecution, see Miss Const Art. 3, § 26.

Acquisition of control shares as not constituting control share acquisition when made pursuant to laws of descent and distribution under Section 91-1-1 et seq., see § 79-27-5.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

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§ 99-1-3. Common-law offenses recognized.

Every offense not provided for by the statutes of this state shall be indictable as heretofore at common law.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 1(48); 1857, ch. 64, art. 355; 1871, § 2862; 1880, § 3097; 1892, § 1452; 1906, § 1525; Hemingway's 1917, § 1287; 1930, § 1312; 1942, § 2560.

JUDICIAL DECISIONS

1. In general.

Suicide is a common-law offense. Nicholson ex rel. Gollott v. State, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

The right is reserved to the state to prosecute crimes which were indictable at common law even though they may not be denominated as such or be provided for by the statute of the state. State ex rel. Maples v. Quinn, 217 Miss. 567, 64 So. 2d 711, 1953 Miss. LEXIS 464 (Miss. 1953).

OPINIONS OF THE ATTORNEY GENERAL

Misprison of a felony is not an offense that may be prosecuted in the State of Mississippi. Mitchell, January 23, 1998, A.G. Op. #98-0019.

RESEARCH REFERENCES

ALR.

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. 37 A.L.R.4th 987.

§ 99-1-5. Time limitation on prosecutions.

The passage of time shall never bar prosecution against any person for the offenses of murder, manslaughter, aggravated assault, aggravated domestic violence, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtaining money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(1)(c), (d) or (2), exploitation of children as described in Section 97-5-33, promoting prostitution under Section 97-29-51(2) when the person involved is a minor, or for any human trafficking offense described in Section 97-3-54.1(1)(a), (1)(b) or (1)(c), Section 97-3-54.2, or Section 93-3-54.3. A person shall not be prosecuted for conspiracy, as described in Section 97-1-1, for felonious assistance-program fraud, as described in Section 97-19-71, or for felonious abuse of vulnerable persons, as described in Sections 43-47-18 and 43-47-19, unless the prosecution for the offense is commenced within five (5) years next after the commission thereof. A person shall not be prosecuted for larceny of timber as described in Section 97-17-59, unless the prosecution for the offense is commenced within six (6) years next after the commission thereof. A person shall not be prosecuted for any other offense not listed in this section unless the prosecution for the offense is commenced within two (2) years next after the commission thereof. Nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(52); 1857, ch. 64, art. 247; 1871, § 2766; 1880, § 3002; 1892, § 1342; 1906, § 1414; Hemingway's 1917, § 1169; 1930, § 1194; 1942, § 2437; Laws, 1912, ch. 261; Laws, 1989, ch. 567, § 1; Laws, 1990, ch. 412, § 1; Laws, 1993, ch. 440, § 1; Laws, 1998, ch. 582, § 1; Laws, 2003, ch. 497, § 1; Laws, 2004, ch. 539, § 1; Laws, 2008, ch. 530, § 1; Laws, 2010, ch. 358, § 1; Laws, 2012, ch. 439, § 3; Laws, 2012, ch. 455, § 1; Laws, 2013, ch. 543, § 18; Laws, 2013, ch. 565, § 2, eff from and after July 1, 2013.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected section references in this section. The references to "Section 97-3-95(c)" were changed to "Section 97-3-95(1)(c) or (d)." The Joint Committee ratified the correction at its May 16, 2002, meeting.

Section 3 of Chapter 439, Laws of 2012, effective July 1, 2012 (approved April 19, 2012), amended this section. Section 1 of Chapter 455, Laws of 2012, effective July 1, 2012 (approved April 23, 2012) also amended this section. As set out above, this section reflects the language of both amendments, pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 16, 2012, meeting of the Committee.

Section 18 of ch. 543, Laws of 2013, effective from and after July 1, 2013 (approved April 25, 2013, 2:55 p.m.), amended this section. Section 2 of ch. 565, Laws of 2013, effective July 1, 2013 (approved April 25, 2013, 4:45 p.m.), amended this section. As set out above, this section reflects the language of Section 2 of ch. 565, Laws of 2013, pursuant to Section 1-3-79, which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date supersedes all other amendments to the same section approved on an earlier date.

Cross References — Absence from state as toll of statute of limitations in civil actions, see § 15-1-63.

Applicability of this section to violations of law or regulations relating to wild animals, birds, or fish, see § 49-5-41.

Commencement of prosecution, see § 99-1-7.

Additional year allowed for reindictment in certain cases, see § 99-1-9.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Application to continuing offenses.
3. Pleading.
4. Miscellaneous.

1. Generally.

Jury could have found that defendant recorded the video of the minor victim on October 28, 2011, well within two years of his arrest date of November 4, 2011, and thus the trial court did not err in denying defendant's motion for a directed verdict after the State's case-in-chief for filming a person in violation of their expectation of privacy; the creation date of the video by defendant in his bathroom was October 28, 2011, and the victim testified that she did not know of any video ever being made. Donaldson v. State, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Court of Appeals properly affirmed defendant's conviction and sentence for Medicaid fraud because the statutory venue provisions were limited to civil cases, defendant's trial was in the county "where the offense was committed," as provided by the state constitution, and Medicaid fraud was exempt from the two-year statute of limitations inasmuch as it was a species of or within the definition of "obtaining money or property under false pretenses or by fraud." Azomani v. State, 222 So. 3d 282, 2017 Miss. LEXIS 220 (Miss. 2017).

Defendant's prosecution for statutory rape, under Miss. Code Ann. § 97-3-65, was not barred by the two-year statute of limitations in Miss. Code Ann. § 99-1-5 because, although statutory rape was not expressly included in the statute, it was within the definition of rape under Miss. Code Ann. § 97-3-68, for purposes of the exceptions to the general two-year statute of limitations. Hernandez v. State, 137 So. 3d 889, 2013 Miss. App. LEXIS 793 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 239 (Miss. 2014).

Entry of an inmate's guilty plea waived his statute of limitations defense under Miss. Code Ann. § 99-1-5. Furthermore, under Miss. Code Ann. § 99-1-7, the prosecution against the inmate commenced on the day that he was indicted, only one year after he committed the offense, and tolled the statute of limitations. Edmondson v. State, 17 So. 3d 591, 2009 Miss. App. LEXIS 525 (Miss. Ct. App. 2009).

Where defendant was charged with possession of marihuana, the failure of the first grand jury to return a true bill against him did not terminate the prosecution against him. The two-year statute of limitations under Miss. Code Ann. § 99-1-5 was not a bar to his prosecution where he was arrested for the offense within two years of the date in which he allegedly committed it. State v. Parkman, 906 So. 2d 888, 2005 Miss. App. LEXIS 402 (Miss. Ct. App. 2005).

Prosecution of defendant for sexual battery commenced, for the purposes of the statute of limitations, when defendant was indicted, 17 months after the date of the alleged offenses; the fact that defendant was tried more than two years after the date of the offenses went only to whether defendant's speedy trial rights had been violated and not to whether the statute of limitations had run. Agee v. State, 829 So. 2d 726, 2002 Miss. App. LEXIS 573 (Miss. Ct. App. 2002).

The statute of limitations in a criminal case is not jurisdictional but is an affirmative defense that may be waived; thus, where pursuant to an agreement a substituted and amended information is filed which charges a new and different offense, prosecution of which is on its face barred by the applicable statute of limitations, a voluntary plea of guilty by a counseled defendant operates to waive the statute of limitations and forfeit the defendant's right to raise the matter in a collateral proceeding. Conerly v. State, 607 So. 2d 1153, 1992 Miss. LEXIS 585 (Miss. 1992).

A simple delay between the date of an offense and the date of the indictment is not per se reversible error, particularly when the reason for the delay is for the purpose of concealing the identity of an undercover agent for a reasonable period of time so that he or she may continue to work effectively as an agent. Thus, a defendant was not denied his right to a speedy trial where a 10-month delay from the time of the criminal act to the charge and arrest was caused by the State's pursuance of a continuing undercover operation. Dedeaux v. State, 519 So. 2d 886, 1988 Miss. LEXIS 48 (Miss. 1988).

In a prosecution for false pretenses, the trial court properly refused to quash the indictment, despite defendant's contention that the indictment charged only conspiracy, a crime not excepted from the two year statute of limitations, and that the prosecution was thus barred; conspiracy is a complete offense in itself and does not merge with the underlying crime, and the fact that a conspiracy is committed along with the crime does not change the nature of the offense nor lessen exposure to punishment. Furthermore, the prosecution was not time barred even though defendant was charged with being an accessory only, which is a separate crime not excepted from the statute, since an accessory before the fact to an excepted felony is treated as a principal. Harrigill v. State, 381 So. 2d 619, 1980 Miss. LEXIS 1887 (Miss.), cert. denied, 446 U.S. 939, 100 S. Ct. 2159, 64 L. Ed. 2d 792, 1980 U.S. LEXIS 1596 (U.S. 1980).

General two-year statute of limitations sets limits on stale prosecutions. Campbell v. State, 309 So. 2d 172, 1975 Miss. LEXIS 1868 (Miss. 1975).

In a prosecution for the sale of marijuana, defendant was not denied due process because of pre-indictment and pretrial delays between the night of the sale and the date of the indictment, where the delays were for the purpose of concealing the identity of an undercover agent for a reasonable period of time so that he may continue to work effectively and where the indictment was returned within the two-year time limit during which prosecutions may be commenced; the defendant's right to a speedy trial as regards delay of prosecution could have accrued no earlier than the date of the return of the indictment. Page v. State, 295 So. 2d 279, 1974 Miss. LEXIS 1494 (Miss. 1974).

This section [Code 1942, § 2437] was not applicable in prosecution of a supervisor whose charge of employing a relative to work on the public roads and who instead employed him on his private farm and paid him out of public moneys, and who was prosecuted under Code 1942, § 2123. Blakeney v. State, 228 Miss. 162, 87 So. 2d 472, 1956 Miss. LEXIS 501 (Miss. 1956).

Prosecution for the crime of escaping jail, begun more than two years after the escape, was barred by limitations. Smith v. State, 17 So. 2d 802 (Miss. 1944).

Where two years and forty-two days elapsed from the date the offense of placing an obstruction on a railroad track whereby a train or part thereof might be derailed was committed to the date the prosecution was begun, and the state did not prove nor attempt to prove, nor was there any evidence on which it could be said that defendant was absent from the state any single day except at the time of his arrest, conviction must be reversed and remanded. McCullar v. State, 183 So. 487 (Miss. 1938).

The statute held applicable to bar a prosecution for obtaining food and lodging with intent to defraud a hotel owner. Steele v. State, 121 Miss. 540, 83 So. 725, 1920 Miss. LEXIS 100 (Miss. 1920).

2. Application to continuing offenses.

In prosecution of father for desertion and failure to provide for support and maintenance of child, testimony offered by prosecution and by defendant which covers period of four and one-half years prior to return of indictment is competent, since alleged offense is continuing one, and it is error for court to confine testimony on behalf of defendant to period of two years prior to return of indictment. Williams v. State, 207 Miss. 816, 43 So. 2d 389, 1949 Miss. LEXIS 391 (Miss. 1949), overruled, Lenoir v. State, 237 Miss. 620, 115 So. 2d 731, 1959 Miss. LEXIS 512 (Miss. 1959).

Statute of limitations does not apply to continuous offense where some portion thereof is within period, although another portion thereof is not within period of limitations. Horton v. State, 175 Miss. 687, 166 So. 753, 1936 Miss. LEXIS 36 (Miss. 1936).

Offense of child desertion is a continuing one, so that prosecution therefor was not barred by three-year statute of limitations, where father deserted family more than two years before prosecution was commenced, but never returned. Horton v. State, 175 Miss. 687, 166 So. 753, 1936 Miss. LEXIS 36 (Miss. 1936).

3. Pleading.

Petitioner was properly denied post-conviction relief after he pled guilty to two counts of sexual battery against a child under the age of 14 where his argument that his prosecution was barred by the applicable statute of limitations was barred; petitioner's plea was voluntarily given and the statute of limitations defense was waived. Laster v. State, 975 So. 2d 240, 2007 Miss. App. LEXIS 6 (Miss. Ct. App. 2007).

Amending the date of the offense from "during the month of July" to "sometime in May or June" was allowed because it was immaterial to the merits of the case and the defense would not be prejudiced by the amendment. Crawford v. State, 754 So. 2d 1211, 2000 Miss. LEXIS 8 (Miss. 2000).

The statute cannot be set up by a demurrer to an indictment, although on its face the prosecution appear to be barred. The defense of limitation can be made by special plea in which case the state can supply the facts if any which take the case out of the statute or the defense can be raised on the evidence under "not guilty." Thompson v. State, 54 Miss. 740, 1877 Miss. LEXIS 92 (Miss. 1877).

4. Miscellaneous.

Defendant's prosecution for shoplifting was not barred by the two-year statute of limitations because the prosecution began when the arrest warrant was issued on January 4, 2016 and the crime had occurred on December 17, 2015. Stevens v. State, 294 So. 3d 699, 2020 Miss. App. LEXIS 128 (Miss. Ct. App. 2020).

Although defendant maintained that the second indictment should have been dismissed because the crimes of burglary and capital murder were both predicated on his commission of an assault, which was subject to a two-year statute of limitations for prosecution, defendant's argument was without merit as the passage of time would never bar prosecution against any person for the offenses of murder, aggravated assault, or burglary. Clark v. State, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

In a Medicaid fraud prosecution, defendant's statute of limitations issue failed because no statute of limitations applied, as Medicaid fraud met the definition in Miss. Code Ann. § 99-1-5 of "obtaining money or property under false pretenses or by fraud." Azomani v. State, 222 So. 3d 343, 2016 Miss. App. LEXIS 510 (Miss. Ct. App. 2016), aff'd on other grounds, 222 So. 3d 282, 2017 Miss. LEXIS 220 (Miss. 2017).

State proved one count of video-voyeurism occurred within the statute of limitations because the parties stipulated the count's video showed defendant possessing a computer defendant bought within the limitations period. Nuckolls v. State, 179 So. 3d 1046, 2015 Miss. LEXIS 586 (Miss. 2015).

Even if defendant had timely objected to the indictment alleging the expiration of the statute of limitations for the first two years of the indictment's time span, the circuit court's solution would have been to amend the indictment to reflect a time period not in conflict with any alleged statute-of-limitations issues, which was essentially done when defense counsel requested and was granted jury instructions that limited the time span for the offenses to 15 months that were within the statute of limitations. Hines v. State, 126 So. 3d 985, 2013 Miss. App. LEXIS 819 (Miss. Ct. App. 2013).

Trial counsel was not ineffective for failing to investigate the State's delay in presenting the charge to the grand jury because the State had two years in which to indict defendant, and the State did so within one year and twenty-five days of defendant's arrest. Jackson v. State, 122 So. 3d 1220, 2013 Miss. App. LEXIS 127 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 531 (Miss. 2013).

In a 28 U.S.C.S. § 2254 case in which a pro se state inmate argued that Count IV of the superseding indictment was time barred by the 2 year statute of limitations under Miss. Code Ann. § 99-1-5, the Crawford decision did not require an indictment to commence prosecution of a felony charge. While it was true that an indictment was required to prosecute one charged with a felony, Mississippi case law suggested and Miss. Code Ann. § 99-1-5 mandated that the process of prosecution commenced prior to indictment; in the present case, the arrest warrants issued on March 21, 2003 and the inmate's own act of turning himself in to authorities on that same day effectively commenced the prosecution of the crimes for which he would later be indicted. Eason v. King, 2010 U.S. Dist. LEXIS 79238 (S.D. Miss. Aug. 4, 2010).

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591, 2009 Miss. App. LEXIS 525 (Miss. Ct. App. 2009).

The state had an unlimited timetable in which to reindict the defendant for aggravated assault after a nolle prosequi was entered concerning the charges in the original indictment, even though the crime at issue was committed before the statute was amended to include the crime of aggravated assault within the list of crimes that are excepted from the general two-year statute of limitation, since the extension of the limitation period in no way altered the definition of the crime with which the defendant was charged. Smoot v. State, 780 So. 2d 660, 2001 Miss. App. LEXIS 8 (Miss. Ct. App. 2001).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. Christmas v. State, 700 So. 2d 262, 1997 Miss. LEXIS 246 (Miss. 1997).

A defendant waived and forfeited his right to assert the statute of limitations under this section as a defense to a charge of aggravated assault when he failed to assert it in the lower court and thereafter entered a voluntary and counseled plea of guilty to the charge. Conerly v. State, 607 So. 2d 1153, 1992 Miss. LEXIS 585 (Miss. 1992).

The two-year statute of limitations applies solely to prosecutions and does not operate to recast the status of a defendant as a prior offender so as to affect conviction of one charged as a second offender under statute making it unlawful to possess or sell intoxicating liquors pursuant to indictment wherein previous conviction charged occurred more than two years prior thereto. McGowan v. State, 200 Miss. 270, 25 So. 2d 131, 1946 Miss. LEXIS 290 (Miss. 1946).

OPINIONS OF THE ATTORNEY GENERAL

Obtaining money or property by use of bad check would be excluded from general two-year statute of limitations. Horan, July 10, 1991, A.G. Op. #91-0469.

Fact that defendant is out on bond, in prison or in jail in another state does not prevent commencement of prosecution within two year time frame. Stuart, March 9, 1994, A.G. Op. #93-0829.

A prosecution for fraud in connection with state or federally funded assistance programs under Miss. Code Section 97-19-71 must be commenced within two years from the commission of such offense, but a prosecution under Miss. Code Section 97-7-42 for the fraudulent use of food coupons dispensed by the state welfare department may begin at any time without a time limitation. Taylor, July 18, 1997, A.G. Op. #97-0407.

RESEARCH REFERENCES

ALR.

Conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged. 47 A.L.R.2d 887.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes. 77 A.L.R.3d 689.

When statute of limitations begins to run on charge of obstructing justice or of conspiring to do so. 77 A.L.R.3d 725.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations. 71 A.L.R.4th 554.

Waivability of bar of limitations against criminal prosecution. 78 A.L.R.4th 693.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 247 et seq.

CJS.

22 C.J.S., Criminal Law §§ 285 et seq.

§ 99-1-7. Time limitation on prosecutions; commencement of prosecution.

A prosecution may be commenced, within the meaning of Section 99-1-5 by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.

HISTORY: Codes, 1857, ch. 64, art. 248; 1871, § 2767; 1880, § 3003; 1892, § 1343; 1906, § 1415; Hemingway's 1917, § 1171; 1930, § 1195; 1942, § 2438.

JUDICIAL DECISIONS

1. In general.

Defendant's prosecution for shoplifting was not barred by the two-year statute of limitations because the prosecution began when the arrest warrant was issued on January 4, 2016 and the crime had occurred on December 17, 2015. Stevens v. State, 294 So. 3d 699, 2020 Miss. App. LEXIS 128 (Miss. Ct. App. 2020).

Defendant was properly denied a new trial because he was not entitled to counsel at the lineup, as at the time of the lineup he was under arrest for a parole violation not for capital murder. Defendant's right to counsel for capital murder had not yet attached because the warrant for capital murder had not been issued and proceedings for capital murder charges had not begun. Howell v. State, 163 So. 3d 240, 2014 Miss. LEXIS 496 (Miss. 2014).

Entry of an inmate's guilty plea waived his statute of limitations defense under Miss. Code Ann. § 99-1-5. Furthermore, under Miss. Code Ann. § 99-1-7, the prosecution against the inmate commenced on the day that he was indicted, only one year after he committed the offense, and tolled the statute of limitations. Edmondson v. State, 17 So. 3d 591, 2009 Miss. App. LEXIS 525 (Miss. Ct. App. 2009).

Defendant was first arrested (for possession of marihuana), on September 20, 2000, and an arrest warrant charging him with possession of a controlled substance was issued on September 21. Thus, under Miss. Code Ann. § 99-1-7 prosecution commenced within the meaning of Miss. Code Ann. § 99-1-5 at that time, and the issue was whether the failure of the first grand jury to return a true bill against him terminated the prosecution against him; the appellate court agreed with those jurisdictions which held that in the absence of a statute or court order, the return of a no bill by a grand jury did not terminate the prosecution of the offense which was the subject of the no bill, and therefore, the lack of action against defendant by the first grand jury did not terminate the prosecution against him, and since there was no dispute that he was arrested for the offense within two years of the date in which he allegedly committed it, his prosecution was not time barred. State v. Parkman, 906 So. 2d 888, 2005 Miss. App. LEXIS 402 (Miss. Ct. App. 2005).

Prosecution of defendant for sexual battery commenced, for the purposes of the statute of limitations, when defendant was indicted, 17 months after the date of the alleged offenses; the fact that defendant was tried more than two years after the date of the offenses went only to whether defendant's speedy trial rights had been violated and not to whether the statute of limitations had run. Agee v. State, 829 So. 2d 726, 2002 Miss. App. LEXIS 573 (Miss. Ct. App. 2002).

Although an indictment is required to prosecute one charged with a felony, for purposes of the statute of limitations, a prosecution can be commenced by the issuance of a warrant or by an arrest. State v. Woodall, 744 So. 2d 747, 1999 Miss. LEXIS 213 (Miss. 1999).

Prosecution had commenced and, therefore, the defendant's constitutional right to counsel had attached at the time of a line up where an arrest warrant had issued and the defendant was in custody. Livingston v. State, 519 So. 2d 1218, 1988 Miss. LEXIS 47 (Miss. 1988).

Once proceedings against a defendant reaches the accusatory stage, a right of counsel attaches, and, for purposes of the state constitutional right, the advent of the accusatory stage is determined by references to state law, including Mississippi Code § 99-1-7 and Rule 1.04, Unif. Crim. R. Civ. Ct. Proc. Page v. State, 495 So. 2d 436, 1986 Miss. LEXIS 2516 (Miss. 1986).

In a criminal prosecution for kidnapping and murder, defendant's right to counsel had attached since criminal proceedings had been started under § 99-1-7. Cannaday v. State, 455 So. 2d 713, 1984 Miss. LEXIS 1753 (Miss. 1984), cert. denied, 469 U.S. 1221, 105 S. Ct. 1209, 84 L. Ed. 2d 351, 1985 U.S. LEXIS 1031 (U.S. 1985), cert. denied, 469 U.S. 1229, 105 S. Ct. 1229, 84 L. Ed. 2d 366, 1985 U.S. LEXIS 1115 (U.S. 1985).

A criminal prosecution is not begun before a justice of the peace by affidavit for, and issuance and execution of, a search warrant without the filing of an affidavit with the justice of the peace to charge the accused with the unlawful possession of intoxicating liquor against the peace and dignity of the state. Ratcliff v. State, 199 Miss. 866, 26 So. 2d 69, 1946 Miss. LEXIS 255 (Miss. 1946).

The crime charged must be shown to have been committed within the period of statutory limitations and after the passage of the particular statute before imposition of a penalty can be prescribed. McLaughlin v. State, 133 Miss. 725, 98 So. 148, 1923 Miss. LEXIS 181 (Miss. 1923).

One charged with embezzlement and arrested and held to bail has had prosecution commenced against him within the meaning of this statute. State v. Hughes, 96 Miss. 581, 51 So. 464, 1910 Miss. LEXIS 180 (Miss. 1910), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

OPINIONS OF THE ATTORNEY GENERAL

Fact that defendant is out on bond, in prison or in jail in another state does not prevent commencement of prosecution within two year time frame. Stuart, March 9, 1994, A.G. Op. #93-0829.

RESEARCH REFERENCES

ALR.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations. 71 A.L.R.4th 554.

Waivability of bar of limitations against criminal prosecution. 78 A.L.R.4th 693.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 247 et seq.

CJS.

22 C.J.S., Criminal Law §§ 285 et seq.

§ 99-1-9. Time limitation on prosecutions; additional year allowed in certain cases.

When an indictment shall be lost or destroyed, or quashed or abated, or the judgment thereon arrested or reversed for any defect therein or in the record, or for any matter of form or other cause, not being an acquittal on the merits, the further time of one year from the time when such indictment shall be lost, destroyed, quashed or abated, or the judgment thereon arrested or reversed, shall be allowed for the finding of a new indictment.

HISTORY: Codes, 1857, ch. 64, art. 249; 1871, § 2768; 1880, § 3004; 1892, § 1344; 1906, § 1416; Hemingway's 1917, § 1172; 1930, § 1196; 1942, § 2439.

JUDICIAL DECISIONS

1. In general.

The statute does not apply to limit the time for a reindictment following the entry of a nolle prosequi by the state. Smoot v. State, 780 So. 2d 660, 2001 Miss. App. LEXIS 8 (Miss. Ct. App. 2001).

This statute prolongs the time in cases where without it the prosecution would be barred, but it does not bar prosecutions under any circumstances to which no other limitation applies. Thompson v. State, 54 Miss. 740, 1877 Miss. LEXIS 92 (Miss. 1877).

RESEARCH REFERENCES

ALR.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

Waivability of bar of limitations against criminal prosecution. 78 A.L.R.4th 693.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 247 et seq.

CJS.

22 C.J.S., Criminal Law §§ 285 et seq.

§ 99-1-11. Costs of search warrant and certain criminal prosecutions.

The person who procures a search warrant, or who charges another with any crime or misdemeanor against his person or property before any court, without reasonable cause, may be required by the court to pay the costs incurred; and judgment may be entered and execution issued therefor.

HISTORY: Codes, 1880, § 3119; 1892, § 888; 1906, § 965; Hemingway's 1917, § 674; 1930, § 681; 1942, § 1592.

Cross References — Affidavit to obtain search warrant, see § 99-25-15.

JUDICIAL DECISIONS

1. In general.

Circuit court has no jurisdiction of appeal from justice court of prosecuting witness taxed with costs for instituting prosecution without reasonable cause. Town of Lumberton v. Peyton, 143 Miss. 777, 109 So. 740, 1926 Miss. LEXIS 320 (Miss. 1926).

OPINIONS OF THE ATTORNEY GENERAL

Prior to assessing court costs to an affiant who fails to appear on the trial date, the justice court would have to make a determination that the affiant initiated the charges without reasonable cause. The affiant would have to be afforded due process. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

RESEARCH REFERENCES

ALR.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking. 44 A.L.R.4th 366.

Am. Jur.

20 Am. Jur. 2d, Costs §§ 99 et seq.

§§ 99-1-13 and 99-1-15. Repealed.

Repealed by Laws, 1977, ch. 408, § 2, eff from and after passage (approved March 29, 1977), and further providing that any funds previously collected under said section shall be paid to the circuit clerk of each county and utilized in accordance with the provisions of this section.

§ 99-1-13. [Codes, 1942, § 1594.5; Laws, 1962, chs. 298, 304; Laws, 1964, ch. 321; Laws, 1968, ch. 331, § 1; Laws, 1968, ch. 332, § 1; Laws, 1969, Ex Sess, ch. 21, § 1; Laws, 1971, ch. 420, § 1; Laws, 1972, ch. 442, §§ 1, 2]

§ 99-1-15. [Codes, 1942, § 1594.7; Laws, 1970, ch. 338, § 1]

Editor's Notes — Former § 99-1-13 was entitled: Library fees collected as costs in certain counties.

Former § 99-1-15 was entitled: Library fees collected as costs; additional counties.

§§ 99-1-17 through 99-1-21. Repealed.

Repealed by Laws, 1990, ch. 329 § 12, eff from and after October 1, 1990.

§ 99-1-17. [En Laws, 1983, ch. 545, § 1; Laws, 1985, ch. 440, § 7; Laws, 1986, ch. 502, § 5]

§ 99-1-19. [En Laws, 1983, ch. 545, § 2; Laws, 1986, ch. 502, § 6]

§ 99-1-21. [En Laws, 1983, ch. 545, § 3; Laws, 1986, ch. 502, § 7; Laws, 1987, ch. 456, § 18]

Editor's Notes — Former § 99-1-17 related to correctional facility construction costs imposed for misdemeanor and felony convictions in addition to other fines and costs.

Former § 99-1-19 related to fees imposed upon professional bondsmen and fees imposed upon defendants.

Former § 99-1-21 related to collection and disposition of costs and fees.

§ 99-1-23. Appearance in court by means of closed circuit television or Web cam.

(1) When the physical appearance in person in court is required of any person who is represented by counsel and held in a place of custody or confinement operated by the state or any of its political subdivisions, upon waiver of any right such person may have to be physically present, such personal appearance may be made by means of closed circuit television or Web cam from the place of custody or confinement, provided that such television or Web cam facilities provide two-way audio-visual communication between the court and the place of custody or confinement and that a full record of such proceedings be made by split-screen imaging and recording of the proceedings in the courtroom and the place of confinement or custody in addition to such other record as may be required, in the following proceedings:

(a) Initial appearance before a judge on a criminal complaint;

(b) Waiver of preliminary hearing;

(c) Arraignment on information or indictment where a plea of not guilty is entered;

(d) Arraignment on information or indictment where a plea of guilty is entered;

(e) Any pretrial or post-trial criminal proceeding not allowing the cross-examination of witnesses;

(f) Sentencing after conviction at trial;

(g) Sentencing after entry of a plea of guilty; and

(h) Any civil proceeding other than trial by jury.

(2) This section shall not prohibit other appearances via closed circuit television or Web cam upon waiver of any right such person held in custody or confinement might have to be physically present.

(3) Nothing contained in this section shall be construed as establishing a right for any person held in custody to appear on television or Web cam or as requiring that a place of custody shall provide a two-way audio-visual communication system.

(4) The provisions of this section shall apply to all courts.

HISTORY: Laws, 2001, ch. 316, § 1; Laws, 2008, ch. 394, § 1, eff from and after July 1, 2008.

Cross References — Bail taken in open court, see § 99-5-3.

Pretrial proceedings, generally, see §§ 99-15-1 et seq.

Arraignment and entry of guilty pleas, see § 99-15-25.

Post-conviction proceeding – time for hearing and return to Department of Corrections, see § 99-19-42.

Post-conviction proceedings, generally, see §§ 99-39-1 et seq.

OPINIONS OF THE ATTORNEY GENERAL

Lunacy hearings fall under the provisions of this section and the chancery court would be allowed to conduct hearings via closed circuit television provided that the attorney representing the respondent waived the personal appearance rights of the respondent. An attorney could waive physical presence and choose to represent his client from either the courthouse or from the place of custody or confinement during a closed circuit television hearing. Alfonso, Aug. 29, 2003, A.G. Op. 03-0384.

A defendant must be represented by counsel in order to waive physical personal appearance and appear via closed circuit television. However, the attorney could choose to represent his client from either the courthouse or the place of custody or confinement during the closed circuit television hearing. Aldridge, Oct. 10, 2003, A.G. Op. 03-0545.

§ 99-1-25. Entrapment; affirmative defense to criminal prosecution; burden of proof.

(1) It is an affirmative defense to a criminal charge that the person was entrapped. To claim entrapment, the person must admit by the person's testimony or other evidence the substantial elements of the offense charged.

(2) A person who asserts an entrapment defense has the burden of proving each of the following by clear and convincing evidence:

(a) The idea of committing the offense was initiated by law enforcement officers or their agents rather than by the person.

(b) The law enforcement officers or their agents urged and induced the person to commit the offense.

(c) The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

(3) A person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity, nor is it entrapment for law enforcement officers or their agents to supply, furnish or sell contraband to an individual where:

(a) There is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(4) The issue of entrapment shall be tried by the trier of fact. The conduct of law enforcement officers and their agents may be considered in determining if a person has proven entrapment.

HISTORY: Laws, 2005, ch. 463, § 7, eff from and after July 1, 2005.

JUDICIAL DECISIONS

ANALYSIS

1. Applicability.
2. Not established.
3. Effect.
4. Jury instructions.
5. Instruction properly denied.

1. Applicability.

Because defendant contended that the cocaine was not hers, her entrapment defense did not apply to her possession of cocaine conviction. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

2. Not established.

Defendant was not entrapped with regard to his bribery of a public official in violation of Miss. Code Ann. § 97-11-11 because testimony of a chief of police, the person that defendant was bribing, established that the government investigation of defendant was instigated by defendant's request that the chief accept money in exchange for notifying defendant when the Mississippi Gaming Commission was coming to a juke joint owned by defendant's brother. Patton v. State, 987 So. 2d 1063, 2008 Miss. App. LEXIS 432 (Miss. Ct. App. 2008).

Court rejected defendant's claim that she established a standard entrapment claim; defendant knew where to find cocaine and had asked the confidential informant to set aside some cocaine for her after the sale, there was no evidence that she was fearful or reluctant to participate on the day of the sale, and defendant was not excused from buying or selling cocaine simply because the informant asked her to do so. The jury, after receiving the entrapment defense instruction, clearly believed defendant was predisposed to commit both crimes of sale of cocaine and possession of cocaine. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Trial court did not err in disallowing testimony of defendant's bad childhood and relationship with her mother, as her defense of entrapment was whether she was predisposed to commit the crime and was induced by law enforcement to do so; defendant testified to everything that she claimed her mother would have testified, and the jury was able to hear the effect of the mother's illness on defendant, plus other testimony concerning an alleged grudge by one agent would have been irrelevant and confusing and misleading to the jury, plus that agent turned over the information to another agent, who made the decision to proceed with the buy. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

3. Effect.

Evidence was sufficient to support defendant's conviction of sale of cocaine; an entrapment defense conceded the factual component of the underlying offense and there was sufficient evidence that defendant sold cocaine, plus there was an audio recording of the transaction and defendant was caught with some of the buy money in her wallet. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Evidence supported defendant's conviction of possession of cocaine; defendant provided no evidence supporting her claim that the cocaine was planted in her car by police, amounting to official misconduct that allegedly constituted entrapment as a matter of law, and defendant was the only person in her car, the cocaine was found in a box in which defendant admitted that she kept drugs, and the jury was unpersuaded, as was the court, that defendant's allegations were sufficient to have required reversal. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

4. Jury instructions.

Defendant failed to establish entrapment as a matter of law; the trial court did not err in not submitting an entrapment as a matter of law instruction given that the trial court found that the facts did not support defendant's claim that law enforcement acted outrageously, plus the court had previously found no entrapment as a matter of law in situations where law enforcement provided the money to the confidential informant to make a purchase, and the court was not persuaded by defendant's claim that her situation was similar to a "reverse sale." Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

5. Instruction properly denied.

Trial court properly refused defendant's entrapment jury instructions, because defendant testified that no one forced him to bring the crack cocaine to the informant's motel room, defendant was not specifically targeted, but rather the informant was instructed to contact anyone she knew who sold drugs, and defendant admitted that he began using cocaine approximately six years prior to trial and admitted that he was the supplier when he and another unnamed friend frequently used drugs together. Forrester v. State, 971 So. 2d 649, 2007 Miss. App. LEXIS 847 (Miss. Ct. App. 2007).

§ 99-1-27. Victim of sex offenses not required to submit to truth telling devices as condition for proceeding with investigation of offense.

(1) No law enforcement officer, prosecutor or other government official shall ask or require an adult, youth or child victim of a sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense.

(2) The refusal of a victim to submit to an examination described above shall not prevent the investigation of the offense.

(3) For purposes of this section, a "sex offense" shall have the meaning ascribed in Section 45-33-23(h).

HISTORY: Laws, 2008, ch. 391, § 4, eff from and after July 1, 2008.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference in subsection (3). The reference to "Section 45-33-23(g)" was changed to "Section 45-33-23(h)." The Joint Committee ratified the correction at its August 1, 2013, meeting.

§ 99-1-29. Certain reproduction during discovery of property or material that constitutes child pornography prohibited.

(1) In any criminal proceeding, evidence that constitutes child pornography prohibited under Sections 97-5-31 and 97-5-33, Mississippi Code of 1972, shall remain in the care, custody, and control of either the prosecution or the court.

(2)(a) Notwithstanding Rule 9.04 of the Mississippi Uniform Circuit and County Court Rules, a court shall deny any request by the defendant in a criminal proceeding to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography; however, the prosecution shall be required to make the property or material reasonably available to the defendant.

(b) For the purposes of this section, property or material shall be deemed to be reasonably available to the defendant if the prosecution provides ample opportunity at a government facility for inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any person the defendant may seek to qualify to furnish expert testimony at trial.

HISTORY: Laws, 2008, ch. 393, § 1, eff from and after July 1, 2008.

CHAPTER 3.

ARRESTS

Sec.

99-3-1. Who may make arrests.
99-3-2. Authorization for federal law enforcement officers to make arrests.
99-3-3. Time or place.
99-3-5. All persons must aid arresting officer when commanded.
99-3-7. When arrests may be made without warrant.
99-3-9. Arrest of defendants in presence of court without process.
99-3-11. Arresting officer or person may break into house.
99-3-13. Officer may pursue and apprehend offender any place in state; jailing prisoner for safekeeping.
99-3-15. Escaped offender may be pursued and retaken without warrant.
99-3-17. Offender must be taken before proper officer without delay.
99-3-18. Post-arrest release on written notice to appear at later date.
99-3-19. Warrant good across county line.
99-3-21. Justice of the peace may issue warrant for offender coming into his jurisdiction.
99-3-23. No liability for legal arrest.
99-3-25. Duty of officers to arrest gamblers, bucket-shop operators and futures dealers.
99-3-27. Tramps; arrest by any person; proceedings.
99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.
99-3-29. Perjury; court may commit wilful perjurer to prison immediately.
99-3-31. Perjury; witnesses to be bound over for grand jury and trial.
99-3-33. Perjury; court may detain documents.
99-3-35. Reward for arrest and delivery of fleeing killer.
99-3-37. Reward for arrest and delivery of fleeing killer; sheriff and other officers may receive.
99-3-39. Rewards for information may be offered by counties and municipalities.
99-3-41. HIV and AIDS testing of persons arrested for the commission of sex crimes against minors.
99-3-43. Criminal history background check to be conducted by officers stopping persons to effectuate arrest.
99-3-45. Requisite notice to be given to persons under the age of twenty-one released following arrest under certain circumstances.

§ 99-3-1. Who may make arrests.

(1) Arrests for crimes and offenses may be made by the sheriff or his deputy or by any constable or conservator of the peace within his county, or by any marshal or policeman of a city, town or village within the same, or by any United States Marshal or Deputy United States Marshal, or, when in cooperation with local law enforcement officers, by any other federal law enforcement officer who is employed by the United States government, authorized to effect an arrest for a violation of the United States Code, and authorized to carry a firearm in the performance of his duties. Private persons may also make arrests.

(2)(a) Any person authorized by a court of law to supervise or monitor a convicted offender who is under an intensive supervision program may arrest the offender when the offender is in violation of the terms or conditions of the intensive supervision program, without having a warrant if:

(i) The arrest is authorized or ordered by a judge of the court;

(ii) The person making the arrest has been trained at the Law Enforcement Officers Training Academy established under Section 45-5-1 et seq. or at a course approved by the Board on Law Enforcement Officer Standards and Training; and

(iii) The judge identifies the person making the arrest in his order and a copy of the order is served upon the person being arrested.

(b) For the purposes of the subsection, the term "intensive supervision program" means an intensive supervision program of the Department of Corrections as described in Section 47-5-1001 et seq., of any similar program authorized by a court for offenders who are not under jurisdiction of the Department of Corrections.

HISTORY: Codes, 1857, ch. 64, art. 273; 1871, § 2773; 1880, § 3023; 1892, § 1372; 1906, § 1444; Hemingway's 1917, § 1201; 1930, § 1224; 1942, § 2467; Laws, 1987, ch. 390, § 2; Laws, 1993, ch. 547, § 1; Laws, 1995, ch. 604, § 1; Laws, 2000, ch. 555, § 1, eff from and after July 2, 2000.

Cross References — Judges as conservators of the peace, see § 9-1-23.
General duties of constables, see § 19-19-5.
Duty of sheriff to keep peace within his county, see § 19-25-67.
Right of railroad police officers to exercise powers of arrest, see § 77-9-505.
Obstructing or resisting arrest, see § 97-9-73.
Time or place of arrest, see § 99-3-3.

JUDICIAL DECISIONS

1. In general.

An arrest made by a sheriff outside his own county is valid only if a similar arrest made by a private person would be lawful. Davis v. United States, 409 F.2d 1095, 1969 U.S. App. LEXIS 12832 (5th Cir. Miss. 1969).

An arrest, within the meaning of the criminal law, is the taking into custody of another person by an officer or a private person for the purpose of holding him to answer to an alleged or suspected crime; and one who voluntarily accompanies an officer to a place where he may be interviewed is not under an arrest. Smith v. State, 229 So. 2d 551, 1969 Miss. LEXIS 1246 (Miss. 1969).

Where officers had probable cause to believe that a felony had been committed and that the defendant was the guilty party their arrest of the defendant in a county beyond their territorial jurisdiction was lawful since, under the facts stated, a private citizen had the right to make the arrest. Nash v. State, 207 So. 2d 104, 1968 Miss. LEXIS 1603 (Miss. 1968).

Where a private person deputized by a justice of the peace to execute a warrant of arrest issued by him acts under the warrant in making the arrest, he is entitled to the protection afforded a de facto officer in serving a warrant. Harris v. State, 72 Miss. 99, 16 So. 360, 1894 Miss. LEXIS 83 (Miss. 1894).

OPINIONS OF THE ATTORNEY GENERAL

Best procedure to follow in most cases where security guard witnesses crime is for guard to file affidavit against perpetrator in municipal or justice court and then if court believes that probable cause exists, court may then issue warrant for such person's arrest and any law enforcement officer would then be fully authorized to make arrest. Norman, August 4, 1993, A.G. Op. #93-0466.

A municipal police department has concurrent jurisdiction with state security personnel over criminal over criminal activity that occurs on state-owned property located within the municipal boundaries, but since there is no authority which gives primary jurisdiction to one agency over another, a cooperative effort should be made on the part of all agencies with jurisdiction to evaluate each occurrence of criminal activity on an individual basis and make a decision as to who should have primary jurisdiction based on the circumstances of the incident and the resources of each investigating agency. Prichard, January 16, 1998, A.G. Op. #98-0009.

RESEARCH REFERENCES

ALR.

False imprisonment: liability of private citizen, calling on police for assistance after disturbance or trespass for false arrest by officer. 21 A.L.R.2d 643.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 A.L.R.3d 1078.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 A.L.R.3d 700.

Modern status or rules as to right to forcefully resist illegal arrest. 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence. 81 A.L.R.4th 1031.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used. 82 A.L.R.4th 598.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Power of Private Citizen to Institute Criminal Proceedings Without Authorization or Approval by Prosecuting Attorney. 90 A.L.R.6th 385.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983). 60 A.L.R. Fed. 204.

Am. Jur.

5 Am. Jur. 2d, Arrest §§ 1 et seq.

9 Am. Jur. Proof of Facts 2d, Police Officer's Use of Excessive Force in Making Arrest, §§ 12 et seq. (proof that police officer, in making an arrest for a misdemeanor and later a felony, used excessive force).

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§ 99-3-2. Authorization for federal law enforcement officers to make arrests.

Any United States Marshal or Deputy United States Marshal is authorized in the performance of his duties to bear arms, to make arrests and to make searches and seizures. Whenever any other federal law enforcement officer who is employed by the United States government, authorized to effect an arrest for a violation of the United States Code, and authorized to carry a firearm in the performance of his duties is working in cooperation with local law enforcement officers, the agent shall have the authority in the performance of his duties to bear arms, to make arrests and to make searches and seizures. Any right granted under this section in no way relieves the requirements of appropriate affidavit and search warrant from the appropriate jurisdiction and authority pursuant to the laws of this state.

HISTORY: Laws, 1987, ch. 390, § 1; Laws, 1993, ch. 547, § 2; Laws, 1995, ch. 604, § 2, eff from and after passage (approved April 7, 1995).

OPINIONS OF THE ATTORNEY GENERAL

This section provides that justice court clerk shall record all affidavits; this section also allows anyone bringing criminal matter in justice court to "lodge the affidavit with the judge or clerk"; judge may choose to have clerk acknowledge affidavit. Ferguson, June 9, 1993, A.G. Op. #93-0331.

RESEARCH REFERENCES

ALR.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child – state cases. 51 A.L.R.5th 425.

§ 99-3-3. Time or place.

Arrests for criminal offenses, and to prevent a breach of the peace, or the commission of a crime, may be made at any time or place.

HISTORY: Codes, 1857, ch. 64, art. 275; 1871, § 2775; 1880, § 3025; 1892, § 1374; 1906, § 1446; Hemingway's 1917, § 1203; 1930, § 1226; 1942, § 2469.

JUDICIAL DECISIONS

1. In general.

An arrest warrant need not be executed at the first available opportunity. Godbold v. State, 731 So. 2d 1184, 1999 Miss. LEXIS 55 (Miss. 1999).

When a crime had recently been committed in the area and a police officer came upon the defendant and observed that he was wearing a concealed weapon, the officer had no choice but to arrest the defendant or prevent him from using his gun and to prevent a breach of the peace; and evidence obtained from a search of the defendant was admissible in court. Chandler v. State, 272 So. 2d 641, 1973 Miss. LEXIS 1537 (Miss. 1973).

Peace officers and citizens may at any time arrest persons who are committing crimes in their presence, or to prevent a breach of the peace. Shinall v. State, 199 So. 2d 251, 1967 Miss. LEXIS 1290 (Miss.), cert. denied, 389 U.S. 1014, 88 S. Ct. 590, 19 L. Ed. 2d 660, 1967 U.S. LEXIS 27 (U.S. 1967), overruled, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

RESEARCH REFERENCES

Am. Jur.

9 Am. Jur. Proof of Facts 2d, Police Officer's Use of Excessive Force in Making Arrest, §§ 12 et seq. (proof that police officer, in making an arrest for a misdemeanor and later a felony, used excessive force).

§ 99-3-5. All persons must aid arresting officer when commanded.

Every person when commanded to do so by an officer seeking to arrest an offender, must aid and assist in making the arrest, and must obey the commands of the officer in respect thereto.

HISTORY: Codes, 1857, ch. 64, art. 274; 1871, § 2774; 1880, § 3024; 1892, § 1373; 1906, § 1445; Hemingway's 1917, § 1202; 1930, § 1225; 1942, § 2468.

Cross References — Sheriffs employing power of county in making arrests, see § 19-25-39.

JUDICIAL DECISIONS

1. In general.

Defendant's motion for post-conviction relief (PCR) was time-barred because the defendant did not file his PCR until more than three years later; defendant had three years with full knowledge of the favorable witness in which to move for post-conviction relief, yet he did not do so, and therefore his PCR was not excepted from the time bar on the basis of newly discovered evidence. Adams v. State, 954 So. 2d 1051, 2007 Miss. App. LEXIS 244 (Miss. Ct. App. 2007).

A railroad policeman making an arrest

of person allegedly stealing coal from his employer, who called to his assistance a deputy sheriff, was not a bystander within the purview of this section [Code 1942, § 2468], where such railroad policeman was himself in charge of the situation and the deputy sheriff was acting under his direction. Jefferson v. Yazoo & M. V. R. R. Co., 194 Miss. 729, 11 So. 2d 442, 1943 Miss. LEXIS 28 (Miss. 1943).

This section [Code 1942, § 2468] justifies neither the officer nor anyone called on to assist him in unnecessarily killing a person in custody. Jefferson v. Yazoo & M. V. R. R. Co., 194 Miss. 729, 11 So. 2d 442, 1943 Miss. LEXIS 28 (Miss. 1943).

RESEARCH REFERENCES

Law Reviews.

Blue, High Noon revisited: commands of assistance by peace officers in the age of the Fourth Amendment. 101 Yale L. J. 1475, May 1992.

§ 99-3-7. When arrests may be made without warrant.

(1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

(2) Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through official channels that the warrant is outstanding for that person's arrest. In all such cases, the officer making the arrest must inform such person at the time of the arrest the object and cause therefor. If the person arrested so requests, the warrant shall be shown to him as soon as practicable.

(3)(a) Any law enforcement officer shall arrest a person with or without a warrant when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor or felony that is an act of domestic violence or knowingly violated provisions of a criminal domestic violence or sexual assault protection order issued pursuant to Section 97-3-7(11), 97-3-65(6) or 97-3-101(5) or an ex parte protective order, protective order after hearing or court-approved consent agreement entered by a chancery, circuit, county, justice or municipal court pursuant to the Protection from Domestic Abuse Law, Sections 93-21-1 through 93-21-29, Mississippi Code of 1972, or a restraining order entered by a foreign court of competent jurisdiction to protect an applicant from domestic violence.

(b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed an act of domestic violence as defined herein, or if two (2) or more persons make complaints of domestic violence to the officer, the officer shall attempt to determine who was the principal aggressor. The term principal aggressor is defined as the party who poses the most serious ongoing threat, or who is the most significant, rather than the first, aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer affirmatively finds more than one (1) principal aggressor was involved, the officer shall document those findings.

(c) To determine which party was the principal aggressor, the officer shall consider the following factors, although such consideration is not limited to these factors:

(i) Evidence from the persons involved in the domestic abuse;

(ii) The history of domestic abuse between the parties, the likelihood of future injury to each person, and the intent of the law to protect victims of domestic violence from continuing abuse;

(iii) Whether one (1) of the persons acted in self-defense; and

(iv) Evidence from witnesses of the domestic violence.

(d) A law enforcement officer shall not base the decision of whether to arrest on the consent or request of the victim.

(e) A law enforcement officer's determination regarding the existence of probable cause or the lack of probable cause shall not adversely affect the right of any party to independently seek appropriate remedies.

(4)(a) Any person authorized by a court of law to supervise or monitor a convicted offender who is under an intensive supervision program may arrest the offender when the offender is in violation of the terms or conditions of the intensive supervision program, without having a warrant, provided that the person making the arrest has been trained at the Law Enforcement Officers Training Academy established under Section 45-5-1 et seq., or at a course approved by the Board on Law Enforcement Officer Standards and Training.

(b) For the purposes of this subsection, the term "intensive supervision program" means an intensive supervision program of the Department of Corrections as described in Section 47-5-1001 et seq., or any similar program authorized by a court for offenders who are not under jurisdiction of the Department of Corrections.

(5) As used in subsection (3) of this section, the phrase "misdemeanor or felony that is an act of domestic violence" shall mean one or more of the following acts between current or former spouses or a child of current or former spouses, persons living as spouses or who formerly lived as spouses or a child of persons living as spouses or who formerly lived as spouses, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, persons who have a current or former dating relationship, or persons who have a biological or legally adopted child together:

(a) Simple or aggravated domestic violence within the meaning of Section 97-3-7;

(b) Disturbing the family or public peace within the meaning of Section 97-35-9, 97-35-11, 97-35-13 or 97-35-15; or

(c) Stalking within the meaning of Section 97-3-107.

(6) Any arrest made pursuant to subsection (3) of this section shall be designated as domestic assault or domestic violence on both the arrest docket and the incident report. Any officer investigating a complaint of a misdemeanor or felony that is a crime of domestic violence who finds probable cause that such an offense has occurred within the past twenty-four (24) hours shall file an affidavit on behalf of the victim(s) of the crime, regardless of whether an arrest is made within that time period. If the crime is reported or investigated outside of that twenty-four-hour period, the officer may file the affidavit on behalf of the victim. In the event the officer does not file an affidavit on behalf of the victim, the officer shall instruct the victim of the procedure for filing on his or her own behalf.

(7) A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause and in good faith pursuant to subsection (3) of this section, or failure, in good faith, to make an arrest pursuant to subsection (3) of this section.

(8) The authority for the State Chief Deputy Fire Marshal and deputy state fire marshals to make arrests shall be governed by the provisions of Section 45-11-1.

HISTORY: Codes, 1857, ch. 64, art. 276; 1871, § 2776; 1880, § 3026; 1892, § 1375; 1906, § 1447; Hemingway's 1917, § 1204; 1930, § 1227; 1942, § 2470; Laws, 1968, ch. 355, § 1; Laws, 1988, ch. 571, § 1; Laws, 1989, ch. 330, § 1; Laws, 1989, ch. 364, § 1; Laws, 1995, ch. 328, § 1; Laws, 1996, ch. 483, § 1; Laws, 1999, ch. 504, § 1; Laws, 2000, ch. 554, § 1; Laws, 2000, ch. 555, § 2; Laws, 2002, ch. 510, § 1; Laws, 2008, ch. 391, § 3; Laws, 2009, ch. 433, § 4; Laws, 2010, ch. 536, § 2; Laws, 2012, ch. 514, § 9; Laws, 2013, ch. 360, § 2; Laws, 2014, ch. 322, § 1; Laws, 2015, ch. 332, § 1; Laws, 2017, ch. 414, § 3, eff from and after passage (approved Apr. 6, 2017).

Joint Legislative Committee Note — Section 1 of ch. 554, Laws, 2000, effective from and after July 1, 2000, amended this section. Section 2 of ch. 555, Laws, 2000, effective from and after July 2, 2000, also amended this section. As set out above, this section reflects the language of Section 2 of ch. 555, Laws, 2000, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section taking effect earlier.

Cross References — Search and Seizure, see U.S. Const., Amend. IV; Miss. Const., Art. 3, § 23.

Authorization of law enforcement officer dispatched to educational institute to arrest upon probable cause, see § 37-11-29.

Immunity of a law enforcement officer for an arrest, or failure to make an arrest, pursuant to this section, see § 93-21-27.

Who may make arrests, see § 99-3-1.

Domestic violence, bail restrictions, see § 99-5-37.

Inapplicability of Mississippi Rules of Evidence to probable cause hearings in criminal cases, see Miss. R. Evid. 1101.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Felony.
3. Misdemeanor.
4. Fresh pursuit.
5. Right to fix bail.
6. "Presence" requirement.
7. Probable cause, generally.
8. —Information obtained from informant.
9. —Information obtained from radio broadcast.
10. —In particular situations.
11. —Lacking in particular situations.
12. Arrest by private person.
13. Admissibility of evidence.
14. Instructions.
15. Third parties.
16. Jurisdiction.
17. Illustrative cases.

1. In general.

Even if the town police officers owed a duty to the murder victim under Miss. Code Ann. § 99-3-7(3)(a), Miss. Code Ann. § 93-21-27 specifically provided immunity to the officers. Fair v. Town of Friars Point, 930 So. 2d 467, 2006 Miss. App. LEXIS 419 (Miss. Ct. App. 2006).

Deputy could lawfully arrest defendant without a warrant pursuant to Miss. Code Ann. § 99-3-7 where the deputy personally observed the property damage and defendant's vehicle, and he gathered a statement from the homeowner; additionally, defendant admitted to the deputy that he hit the mailbox, such that the presence requirement of § 99-3-7 was satisfied. Spencer v. State, 908 So. 2d 783, 2005 Miss. App. LEXIS 123 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 498 (Miss. 2005).

Where the victim was shot by her estranged husband after an arrest warrant was issued, but never delivered to the sheriff's department, there was ample probable cause to arrest through Miss. Code Ann. § 99-3-7(3), based upon Miss. Code Ann. § 97-35-15. However, reckless disregard required that the person knowingly or intentionally commit a wrongful act and even viewing the facts in a light most favorable to the victim, the victim showed no evidence that the sheriff's department knew that it could and/or was required to arrest the victim's estranged husband; the sheriff's department's conduct, even if negligent, could not be said to have risen to the level of reckless disregard, and therefore, Miss. Code Ann. § 11-46-9(c) did provide immunity based upon the sheriff's department's conduct, and summary judgment was proper as to the sheriff's department. Collins v. Tallahatchie County, 876 So. 2d 284, 2004 Miss. LEXIS 798 (Miss. 2004).

A police officer's statement that he had a warrant for defendant's arrest did not invalidate the arrest, even though the arrest warrant was not valid, where the officer had knowledge of facts sufficient to constitute probable cause for a warrantless arrest pursuant to this section. Lanier v. State, 450 So. 2d 69, 1984 Miss. LEXIS 1695 (Miss. 1984).

There was sufficient compliance with this section when the arresting officer informed defendant that he was being arrested for larceny and gave him a copy of the arrest warrant as soon as they had reached the jail. Wilcher v. State, 448 So. 2d 927, 1984 Miss. LEXIS 1618 (Miss.), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160, 1984 U.S. LEXIS 369 (U.S. 1984).

A warrantless arrest of an occupant of an automobile who matched the description of the person who robbed a motel 45 minutes before was made with probable cause and was valid under this section where the officers told the occupant that he was under arrest for investigation. Johnson v. State, 347 So. 2d 358, 1977 Miss. LEXIS 2039 (Miss. 1977).

A policeman had authority to make a warrantless arrest of defendant where, though defendant contended he was being followed by police because of a report that defendant had assaulted someone earlier in the day, evidence supported the policemen's contention that they were following him to take him into custody for reckless driving after observing him driving at an excessive speed, spinning his wheels, and fishtailing. Kinney v. State, 336 So. 2d 493, 1976 Miss. LEXIS 1509 (Miss. 1976).

Where a police officer was pursuing the defendant in an effort to arrest him for an offense committed in the officer's presence, the officer was not required to inform the defendant of the object and cause of the arrest. Watts v. State, 305 So. 2d 348, 1974 Miss. LEXIS 1479 (Miss. 1974).

Where there was an outstanding warrant for the arrest of defendant at the time of the arrest, and the arresting officer knew of its existence, the failure of the arresting officer to provide the warrant for defendant's arrest on a misdemeanor charge did not entitled defendant to resist arrest. Torrence v. State, 283 So. 2d 595, 1973 Miss. LEXIS 1232 (Miss. 1973).

A sheriff had no right to arrest the defendant unless it was evident to him at the time that some breach of the peace was being threatened or a crime was being committed in his presence. Terry v. State, 252 Miss. 479, 173 So. 2d 889, 1965 Miss. LEXIS 1123 (Miss. 1965), overruled, Strode v. State, 231 So. 2d 779, 1970 Miss. LEXIS 1605 (Miss. 1970).

An arrest begins when the officer begins his pursuit for the purpose of making it, and if he does not have the authority to make an arrest for possession of whisky at the instant he begins his pursuit of an automobile for that purpose, the fact that the person the officer is pursuing violates a traffic law in making his escape does not thereby authorize the arrest which began unlawfully. Terry v. State, 252 Miss. 479, 173 So. 2d 889, 1965 Miss. LEXIS 1123 (Miss. 1965), overruled, Strode v. State, 231 So. 2d 779, 1970 Miss. LEXIS 1605 (Miss. 1970).

An arrest without a warrant, otherwise legal, is not rendered illegal by the failure of the arresting officer to inform the person arrested of the object and cause of his arrest. Fuqua v. State, 246 Miss. 191, 145 So. 2d 152, 1962 Miss. LEXIS 522 (Miss. 1962), cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125, 1963 U.S. LEXIS 1814 (U.S. 1963).

Pursuit and arrest without a warrant is not rendered permissible by the fact that a motorist on seeing the sheriff in a car alongside, drove away as rapidly as possible, incidentally violating traffic laws. Smith v. State, 240 Miss. 738, 128 So. 2d 857, 1961 Miss. LEXIS 505 (Miss. 1961).

The legislature by this section [Code 1942, § 2470] extended the common-law authority of officers to make arrests without a warrant to indictable offenses committed or attempted in the presence of an officer whether or not a breach of the peace was involved. Smith v. State, 228 Miss. 476, 87 So. 2d 917, 1956 Miss. LEXIS 535 (Miss. 1956).

Where there was a violation of the law in operation of movie theater on a Sunday after 6 p.m., the police officers, in whose presence the law was violated, were authorized to make multiple arrests without warrants. Paramount-Richards Theatres, Inc. v. Hattiesburg, 210 Miss. 271, 49 So. 2d 574, 1950 Miss. LEXIS 347 (Miss. 1950).

A sheriff entering one's private backyard and, upon smelling liquor, arrested the owner for possession of intoxicating liquor, was a trespasser, and the arrest was illegal where the sheriff had no warrant. Hartfield v. State, 209 Miss. 787, 48 So. 2d 507, 1950 Miss. LEXIS 443 (Miss. 1950).

To justify officer's arrest of person without warrant for commission of misdemeanor in his presence, there must presently exist, independently of confession, essential facts to the knowledge of person making arrest which constitute corpus delicti. Harris v. State, 209 Miss. 183, 46 So. 2d 194, 1950 Miss. LEXIS 378 (Miss. 1950).

Finding of liquor in purse on rear seat of car by officer making search of automobile under search warrant does not authorize officer to arrest husband of owner of purse for unlawful possession of liquor without warrant, and arrest cannot be vindicated by finding, after arrest, of liquor in possession of defendant husband. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

Finding of liquor in purse on rear seat of car, belonging to woman in car, by officer making search of automobile under search warrant does not authorize officer to arrest without warrant former passenger who has left car and entered his own place of business, and subsequent search of passenger's person is unlawful. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

Arrest without warrant for illegal possession of intoxicating liquor was lawful where the officer smelled whiskey on the accused and saw a bottle in his pocket, even though the whiskey in the bottle was not visible until after the arrest. Copeland v. State, 202 Miss. 58, 30 So. 2d 509, 1947 Miss. LEXIS 241 (Miss. 1947).

Deputy sheriffs had no right to arrest without warrant man approaching illicit still, unless they had reasonable ground to suspect and believe that he owned or was operating still and informed him of object and cause of arrest. Hinton v. Sims, 171 Miss. 741, 158 So. 141, 158 So. 778, 1934 Miss. LEXIS 276 (Miss. 1934).

Generally, officer seeking to arrest another without warrant should tell latter to consider himself under arrest, though not required to inform him of object and cause of arrest until after it is made. Hinton v. Sims, 171 Miss. 741, 158 So. 141, 158 So. 778, 1934 Miss. LEXIS 276 (Miss. 1934).

Deputy sheriff's attempted arrest without warrant of man approaching illicit still by commanding him to raise hands, instead of telling him to consider himself under arrest, held illegal. Hinton v. Sims, 171 Miss. 741, 158 So. 141, 158 So. 778, 1934 Miss. LEXIS 276 (Miss. 1934).

One whom deputy sheriffs illegally attempted to arrest without warrant by commanding him to raise his hands, instead of telling him to consider himself under arrest, had right to resist officers with force necessary to meet force. Hinton v. Sims, 171 Miss. 741, 158 So. 141, 158 So. 778, 1934 Miss. LEXIS 276 (Miss. 1934).

A person who before arrest states that certain kegs in his automobile contained whisky may be arrested without warrant and the officer may seize the intoxicating liquor without warrant for a crime committed in his presence. Williamson v. State, 140 Miss. 841, 105 So. 479, 1925 Miss. LEXIS 314 (Miss. 1925).

2. Felony.

Arrest is valid if arresting officer has probable cause to believe that felony has been committed and probable cause to believe that suspect to be arrested committed the felony; probable cause means less than evidence which would justify condemnation but more than bare suspicion. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

A warrant is not necessary for an arrest when a felony has been committed and there is reasonable ground to believe the one arrested committed the crime. McEwen v. State, 224 So. 2d 206, 1969 Miss. LEXIS 1290 (Miss. 1969).

If a person has committed a felony though not in the presence of the officer, an officer may arrest him without warrant, or may make arrest of felons where he has reasonable grounds to believe that the person to be arrested has committed a felony. Kennedy v. State, 139 Miss. 579, 104 So. 449, 1925 Miss. LEXIS 175 (Miss. 1925).

Officer having knowledge or probable grounds for believing that felony is being committed may go on premises without warrant for arrest, and without search warrant, and arrest for felony. Pickett v. State, 139 Miss. 529, 104 So. 358, 1925 Miss. LEXIS 174 (Miss. 1925).

3. Misdemeanor.

Sufficient evidence supported defendant's conviction for misdemeanor domestic violence, pursuant to Miss. Code Ann. § 97-3-7(3), because the 911 dispatcher testified the victim, who was defendant's husband, stated defendant bit him during an altercation, pictures of the victim's injuries were admitted into evidence, and defendant admitted biting the victim; the husband's decision not to cooperate with the prosecution did not preclude a charge of domestic violence against defendant, pursuant to Miss. Code Ann. § 99-3-7(3)(a). Anderson v. State, 102 So. 3d 304, 2012 Miss. App. LEXIS 510 (Miss. Ct. App. 2012), cert. dismissed, 105 So. 3d 326, 2013 Miss. LEXIS 37 (Miss. 2013).

Failure to make an arrest where there was probable cause that an act of domestic violence had occurred did not inherently establish reckless disregard for safety so as to overcome the city's immunity under Miss. Code Ann. § 11-46-9(1)(c). City of Laurel v. Williams, 21 So. 3d 1170, 2009 Miss. LEXIS 566 (Miss. 2009).

The defendant was properly arrested for possession of alcohol in a dry county, notwithstanding the absence of any breach of peace threatened or attempted in the presence of the arresting officer; the officer approached the vehicle in which the defendant was seated in good faith and in response to a reported domestic disturbance call. Northington v. State, 749 So. 2d 1099, 1999 Miss. App. LEXIS 470 (Miss. Ct. App. 1999).

The misdemeanor offenses of reckless driving and driving under the influence of intoxicating liquor were both committed in the presence of a police officer within the meaning of this section, even though he did not observe the defendant driving, and thus rendered the defendant's arrest legal, where the officer observed an accident upon arriving at the scene, the position of the vehicles, the damage to each, an ambulance, attendants attempting to revive one of the victims, the defendant sitting under a steering wheel, the strong odor of alcohol on defendant's breath, the defendant's slurred speech, and his unsteadiness on his feet; accordingly, results of a blood test administered after defendant's arrest were properly admitted into evidence, particularly where the officer learned that the victim was dead prior to administering the test, whereupon he had the right to detain defendant on the felony charge of culpably negligent homicide. Williams v. State, 434 So. 2d 1340, 1983 Miss. LEXIS 2727 (Miss. 1983), but see Fisher v. Eupora, 587 So. 2d 878, 1991 Miss. LEXIS 669 (Miss. 1991).

An officer making an arrest for a misdemeanor not committed in his presence must have the warrant for such arrest in his actual possession if the arrest is to be lawful. Butler v. State, 212 So. 2d 573, 1968 Miss. LEXIS 1289 (Miss. 1968).

An officer making an arrest for a misdemeanor not committed in his presence must have the warrant of arrest in his actual possession if the arrest is to be lawful, and he must show it to the accused if requested to do so. Smith v. State, 208 So. 2d 746, 1968 Miss. LEXIS 1418 (Miss. 1968).

An officer who has in good faith stopped an automobile to check the operator's license, may make an arrest for a misdemeanor committed in his presence, such as the carrying of a concealed weapon, discovered while searching the car. Morgan v. Heidelberg, 246 Miss. 481, 150 So. 2d 512, 1963 Miss. LEXIS 468 (Miss. 1963).

The arrest for misdemeanors committed or attempted in the presence of officers must be made as quickly after the commission of the offense as the circumstances will permit. Smith v. State, 228 Miss. 476, 87 So. 2d 917, 1956 Miss. LEXIS 535 (Miss. 1956).

Officer has right to make an arrest without warrant for the commission of misdemeanor in his presence, and misdemeanor is being committed in presence of officer when he then and there acquires knowledge thereof through one of his senses. Thomas v. State, 208 Miss. 264, 44 So. 2d 403, 1950 Miss. LEXIS 245 (Miss. 1950).

Officer is authorized to arrest defendant for unlawful possession of liquor without warrant only if misdemeanor is being knowingly committed in his presence. Kelly v. State, 43 So. 2d 383 (Miss. 1949).

As regards arrest without warrant, a misdemeanor is being committed in the presence of an officer when he then and there acquires knowledge thereof through one of his senses or inferences properly to be drawn from the testimony of the senses. Copeland v. State, 202 Miss. 58, 30 So. 2d 509, 1947 Miss. LEXIS 241 (Miss. 1947).

4. Fresh pursuit.

Where a felony is committed at night and, being discovered the next morning, an officer and others immediately followed and shortly coming upon the felon in hiding he flees and is followed, this is a fresh pursuit within the meaning of the section [Code 1942, § 2470] and a warrant for the arrest is not necessary. White v. State, 70 Miss. 253, 11 So. 632, 1892 Miss. LEXIS 62 (Miss. 1892).

5. Right to fix bail.

This section [Code 1942, § 2470], coupled with the right of a sheriff to place in jail a person arrested, necessarily implies that a sheriff has the right to fix the amount of bail of a person arrested without a warrant for an indictable offense committed in his presence and to determine the sufficiency of the bail bond tendered to him, rather than indefinitely to detain the accused in jail pending the availability of a mayor or justice of the peace. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745, 1947 Miss. LEXIS 378 (Miss. 1947).

6. “Presence” requirement.

A conservation officer properly entered private property to arrest the defendants for hunting violations since his personal observations led him to believe that hunting violations were then and there occurring in his presence where he observed an individual in a tree stand (approximately 15 to 20 feet above ground) with a gun but not wearing hunter orange and had information that individuals were hunting over bait on the property. Corry v. State, 710 So. 2d 853, 1998 Miss. LEXIS 128 (Miss. 1998).

A defendant’s arrest for driving while intoxicated was legal, and therefore the subsequent intoxilyzer test was not tainted, even though the arresting officer did not observe the defendant driving, where the defendant admitted to the arresting officer that he had been driving an automobile which was involved in an accident, and the defendant was publicly intoxicated in the presence of the officer and others in violation of § 97-29-47. Goforth v. Ridgeland, 603 So. 2d 323, 1992 Miss. LEXIS 348 (Miss. 1992).

The “presence” requirement of this section had been met and an officer properly arrested the defendant for a misdemeanor crime, where the officer obtained sufficient facts to establish the corpus delicti of a crime and additionally obtained a confession. Bayse v. State, 420 So. 2d 1050, 1982 Miss. LEXIS 2176 (Miss. 1982).

An offense is being committed in the presence of an officer, pursuant to this section, when he acquires knowledge thereof through one of his senses. Where, through the sense of sight, smell, or hearing, an officer receives knowledge that an offense is being committed in his presence, he may arrest the offender without a warrant. Accordingly, where police officers had been monitoring a conversation taking place inside a house and were aware that marijuana was inside the house and that a sale was in progress, a felony was being committed in the presence of officers who were monitoring the conversation and an officer was authorized to arrest the defendant without a warrant. Moss v. State, 411 So. 2d 90, 1982 Miss. LEXIS 1889 (Miss. 1982).

Where through the senses of sight, smell, or hearing, an officer receives knowledge that the offense of carrying a concealed weapon is being committed in his presence, he may arrest the offender without a warrant. Reed v. State, 199 So. 2d 803, 1967 Miss. LEXIS 1309 (Miss. 1967), cert. denied, 390 U.S. 413, 88 S. Ct. 1113, 19 L. Ed. 2d 1273, 1968 U.S. LEXIS 2174 (U.S. 1968).

If an officer witnesses a commission of an offense and does not arrest the offender, but departs, on other business, or for other purposes, and afterwards returns, he cannot then arrest the offender without a warrant, for then the reasons for allowing the arrest to be made without a warrant have disappeared. Smith v. State, 228 Miss. 476, 87 So. 2d 917, 1956 Miss. LEXIS 535 (Miss. 1956).

7. Probable cause, generally.

Law enforcement may arrest a suspect without a warrant when an officer has probable cause to believe that a felony has been committed by the person to be arrested. Avery v. State, 179 So. 3d 1182, 2015 Miss. App. LEXIS 320 (Miss. Ct. App.), cert. denied, 179 So. 3d 1137, 2015 Miss. LEXIS 594 (Miss. 2015), cert. denied, — U.S. —, 136 S. Ct. 1210, 194 L. Ed. 2d 213, 2016 U.S. LEXIS 1602 (U.S. 2016).

Probable cause existed for a warrantless arrest because a clerk’s identification was sufficient to provide the police with reasonable grounds to suspect that defendant committed the crime, and police suspicions were heightened the following day when a detective noticed a man fitting defendant’s description outside of another gas station. When approached, defendant fled, and in doing so, he discarded a knife later confirmed by the store clerk to be the same knife used in the robbery. Jones v. State, 993 So. 2d 386, 2008 Miss. App. LEXIS 232 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

In defendant's auto burglary case, an officer had probable cause for a warrantless arrest of defendant because the arresting officer testified that he was aware that there had been an attempted vehicle burglary nearby, and when the individual seen inside the car did not respond to the officer's two requests to exit the vehicle, the officer had probable cause to break the car window and detain the individual; the fact that defendant physically resisted the officer's lawful requests, after reasonable suspicion was established, furthered the establishment of probable cause to arrest him. Qualls v. State, 947 So. 2d 365, 2007 Miss. App. LEXIS 21 (Miss. Ct. App. 2007).

Defendant's warrantless arrest for murder by Tennessee police was supported by probable cause: he left Mississippi by bus on the day of the murder, the man who drove him to the bus station implicated himself in the crime, a bloody palm print at the crime scene suggested that the killer cut his right hand, and Tennessee police confirmed that defendant had an injured hand. Jones v. State, 841 So. 2d 115, 2003 Miss. LEXIS 134 (Miss. 2003).

Where a defendant was arrested without a warrant in Tennessee for a murder committed in Mississippi, the Tennessee police were entitled to rely on information Mississippi police relayed to them which established probable cause for the arrest. Jones v. State, 841 So. 2d 115, 2003 Miss. LEXIS 134 (Miss. 2003).

Existence of probable cause or reasonable grounds justifying arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Failure to inform the accused of the object and cause of his arrest, as required under this section, merely shifts the burden of proving probable cause to the state. Upshaw v. State, 350 So. 2d 1358, 1977 Miss. LEXIS 2249 (Miss. 1977).

Where the sheriff was present with the chief of police and the affiant, and personally observed the making of the affidavit and the issuance of an arrest warrant, after which the chief of police and the sheriff went in opposite directions with the chief of police taking the warrant, and the sheriff arrested the defendant and informed him of the cause of his arrest, the state was not obliged to prove probable cause with respect to the arrest. Johnson v. State, 260 So. 2d 436, 1972 Miss. LEXIS 1557 (Miss. 1972).

Probable cause to make an arrest means less evidence than would justify condemnation, but more than bare suspicion. Powe v. State, 235 So. 2d 920, 1970 Miss. LEXIS 1471 (Miss. 1970).

Where an officer, in good faith, believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinarily prudent man, under the circumstances, to believe likewise, he has such probable cause as will justify him for arresting without a warrant. Canning v. State, 226 So. 2d 747, 1969 Miss. LEXIS 1316 (Miss. 1969), overruled, White v. State, 571 So. 2d 956, 1990 Miss. LEXIS 758 (Miss. 1990).

Probable cause for the arrest of an accused without a warrant is a judicial question, and the arresting officer is not the final judge of whether he has sufficient information on which to base his actions in making an arrest. Canning v. State, 226 So. 2d 747, 1969 Miss. LEXIS 1316 (Miss. 1969), overruled, White v. State, 571 So. 2d 956, 1990 Miss. LEXIS 758 (Miss. 1990).

A police officer is not the final judge as to whether he had probable cause to make an arrest. Ray v. R. G. Le Tourneau, Inc., 220 So. 2d 837, 1969 Miss. LEXIS 1481 (Miss. 1969).

An officer without a warrant may arrest a person when he has reasonable cause to believe that a felony has been committed, and reasonable cause to believe that such person committed it. Lathers v. United States, 396 F.2d 524, 1968 U.S. App. LEXIS 6801 (5th Cir. Miss. 1968).

Objection that arrest was not upon probable cause is waived by failure to raise it at the trial. Gordon v. State, 160 So. 2d 73 (Miss. 1964).

Probable cause for an arrest exists where the arresting officer has official information that a criminal charge has been placed against the person arrested, and has recognized him from a photograph. Fuqua v. State, 246 Miss. 191, 145 So. 2d 152, 1962 Miss. LEXIS 522 (Miss. 1962), cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125, 1963 U.S. LEXIS 1814 (U.S. 1963).

It is not enough that there is a good ground to believe that a felony has been committed, but the ground for the belief must include also as an element essential to the right to arrest that the party to be arrested is the person guilty of felony, and without the second element, the first had as well not exist, and it is not enough that there was good ground to believe that the person proposed to be arrested was present at the time the felony was committed. Branning v. State, 215 Miss. 223, 60 So. 2d 633, 1952 Miss. LEXIS 556 (Miss. 1952).

In an action for alleged unlawful assault and battery and unlawful arrest and imprisonment where it was shown that the officers had no warrant, but there was factual issue as to whether plaintiff when arrested was engaged in the actual commission of an offense in the presence of these officers, it was a question for the jury as to whether the officers had authority to make the arrest. State use of Smith v. Broom, 58 So. 2d 32 (Miss. 1952).

This statute is declaratory of the common law and under it there must be probable cause to believe that a felony has been committed, and that the person to be arrested is the guilty party. Craft v. State, 202 Miss. 43, 30 So. 2d 414, 1947 Miss. LEXIS 239 (Miss. 1947).

Under this section [Code 1942, § 2470], it is not enough that there is good ground to believe that a felony has been committed, but the ground for the belief must include also as an element essential to the right to arrest that the party to be arrested is the party guilty of the felony. Craft v. State, 202 Miss. 43, 30 So. 2d 414, 1947 Miss. LEXIS 239 (Miss. 1947).

An arrest without warrant cannot be made on the belief that the person proposed to be arrested was present at the time that a felony was committed. Craft v. State, 202 Miss. 43, 30 So. 2d 414, 1947 Miss. LEXIS 239 (Miss. 1947).

8. —Information obtained from informant.

Detective had both exigent circumstances and probable cause to make the warrantless entry into the residence and arrest defendant after investigating the reliable anonymous tip concerning drug activity and going in hot pursuit of defendant after he fled from lawful questioning about that tip. Cooper v. State, 145 So. 3d 1219, 2013 Miss. App. LEXIS 686 (Miss. Ct. App. 2013), aff'd, 145 So. 3d 1164, 2014 Miss. LEXIS 433 (Miss. 2014).

Sheriff who arrested defendant, on the basis of information furnished by a person who, by giving the information, implicated his brother as well as the defendant, acted with probable cause. Moore v. State, 493 So. 2d 1295, 1986 Miss. LEXIS 2608 (Miss. 1986).

Information obtained from an anonymous telephone informer that the defendant would be transporting whisky in a certain automobile at a certain place and time does not constitute probable cause for the search of the defendant's automobile and the seizure of liquor found there. Terry v. State, 252 Miss. 479, 173 So. 2d 889, 1965 Miss. LEXIS 1123 (Miss. 1965), overruled, Strode v. State, 231 So. 2d 779, 1970 Miss. LEXIS 1605 (Miss. 1970).

9. —Information obtained from radio broadcast.

Incriminating oral statements given by defendant's brother and brother-in-law, which placed defendant at the scene of the crime, and a police radio report that there was a warrant for his arrest, furnished police officers with probable cause to arrest defendant. Kelly v. State, 493 So. 2d 356, 1986 Miss. LEXIS 2575 (Miss. 1986).

In a prosecution for armed robbery, the defendant's arrest was lawful where one of the arresting officers testified that he had received information on his police radio that there was a warrant for the defendant's arrest and where this official information was presumed to be authentic and was sufficient to constitute probable cause for the arrest of the defendant by officers without the warrant being in their possession. Anderson v. State, 397 So. 2d 81, 1981 Miss. LEXIS 1988 (Miss. 1981).

A radio dispatch from the highway safety patrol which described the getaway vehicle used in a robbery, supplied the arresting officer with probable cause to pursue the described automobile and to arrest its occupants, one of whom was the defendant. Norwood v. State, 258 So. 2d 756, 1972 Miss. LEXIS 1512 (Miss. 1972).

Probable cause for arrest was lacking where the arrest was made on the basis of information given on a police radio bulletin describing the defendant and another person, the automobile which they were probably driving, and items allegedly stolen from a building, but which information was in turn based on an uncorroborated tip from an informer. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306, 1971 U.S. LEXIS 65 (U.S. 1971).

10. —In particular situations.

Arrestee's 42 U.S.C.S. § 1983 suit against a municipal police chief and an officer failed because the officer had authority under Miss. Code Ann. § 99-3-7(1) to travel outside his jurisdiction to make a warrantless arrest based on information provided to the chief that the arrestee had embezzled money while working at a local bank. Brown v. Town of DeKalb, 519 F. Supp. 2d 635, 2007 U.S. Dist. LEXIS 67600 (S.D. Miss. 2007).

Based on a description of a car, an officer's recognition of defendant from a bank videotape, and a description of persons who had committed several violent crimes, an officer's decision to stop a vehicle and arrest the occupants was valid under Miss. Code Ann. § 99-3-7. Perkins v. State, 863 So. 2d 47, 2003 Miss. LEXIS 657 (Miss. 2003).

Defendant's warrantless arrest for murder by Tennessee police was supported by probable cause: he left Mississippi by bus on the day of the murder, the man who drove him to the bus station implicated himself in the crime, a bloody palm print at the crime scene suggested that the killer cut his right hand, and Tennessee police confirmed that defendant had an injured hand. Jones v. State, 841 So. 2d 115, 2003 Miss. LEXIS 134 (Miss. 2003).

Where a defendant was arrested without a warrant in Tennessee for a murder committed in Mississippi, the Tennessee police were entitled to rely on information Mississippi police relayed to them which established probable cause for the arrest. Jones v. State, 841 So. 2d 115, 2003 Miss. LEXIS 134 (Miss. 2003).

Police officer properly relied on computer report that indicated defendant's driver's license had been suspended and an information provided in a be-on-the-lookout-for-defendant order to make an initial detention in an investigatory traffic stop and subsequent arrest of defendant. Hodge v. State, 801 So. 2d 762, 2001 Miss. App. LEXIS 460 (Miss. Ct. App. 2001).

Probable cause existed for the arrest of the defendant where (1) the body of a young child was found by the police, (2) the autopsy showed that she had been assaulted by a man, and (3) the defendant babysat her the night before and was the last person to see her before she disappeared. Brewer v. State, 725 So. 2d 106, 1998 Miss. LEXIS 345 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365, 1999 U.S. LEXIS 2032 (U.S. 1999).

Officers had probable cause to arrest defendant based on facts that they were investigating a bloody murder, person wearing red shirt and dark pants had been seen leaving the crime scene, defendant had been wearing an orange shirt and black shorts on the night of the murder, defendant was seen covered in blood and carrying a baseball bat, and victim had been hit with an object of some sort, and absence of corroboration of defendant's claim that he had been in a fight. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

A sheriff had probable cause to arrest a defendant for capital murder and armed robbery without a warrant where the sheriff had information from two informants implicating the defendant and his codefendant, the sheriff knew from past experience that one of the informants was very reliable, and the informants accurately identified the codefendant as the "trigger man" which suggested some basis of knowledge and further reliability. Abram v. State, 606 So. 2d 1015, 1992 Miss. LEXIS 448 (Miss. 1992), overruled in part, Foster v. State, 961 So. 2d 670, 2007 Miss. LEXIS 315 (Miss. 2007), overruled in part, Holly v. Mississippi, 2011

U.S. App. LEXIS 24853 (5th Cir. Miss. Dec. 13, 2011).

There was sufficient probable cause to arrest a defendant for distribution of a controlled substance to an undercover informant, even though none of the arresting officers actually saw the drug transaction occur, where the conversation between the defendant and the undercover informant was being monitored by the officers during the transaction, the officers testified that they had surrounded the building in their cars to monitor the entrance and exit of anyone on the premises, the undercover informant gave the signal, "[t]his is good stuff" in order to alert the officers that the crime had occurred, and there was no one other than the defendant in close proximity to the informant when the officers arrived. Rogers v. State, 599 So. 2d 930, 1992 Miss. LEXIS 123 (Miss.), overruled in part, Mayfield v. State, 612 So. 2d 1120, 1992 Miss. LEXIS 861 (Miss. 1992).

A sheriff properly made a warrantless arrest and seizure of evidence from defendant, where the sheriff arrested defendant only after observing him drinking beer, weaving somewhat and having slurred speech. Bryant v. State, 427 So. 2d 131, 1983 Miss. LEXIS 2449 (Miss. 1983).

In a prosecution for burglary, the trial court properly denied a motion to suppress evidence seized after defendant's warrantless arrest where probable cause for the arrest was established by the high crime area where the arrest took place, the early morning hour, the sound of breaking glass, the furtive actions of defendant (flight, disposal of a bag he was carrying, dubious explanation for his presence at the scene), the defendant's nervousness, and the absence of others in the area. Smith v. State, 386 So. 2d 1117, 1980 Miss. LEXIS 2059 (Miss. 1980).

A police officer had probable cause to arrest a suspected rapist at the conclusion of a police-monitored telephone call to the victim five months following the rape, where police units were directed by radio to begin checking pay phones in a certain area and to be on the lookout for a man of a certain description, and where the officer observed defendant, who met the approximate description of the attacker, hanging up a pay phone at the same time he was being radioed that the caller was hanging up or about to hang up. Covan v. State, 374 So. 2d 833, 1979 Miss. LEXIS 2397 (Miss. 1979).

Where state police officer knew before the arrest that postal money orders had been stolen, that they were made out in a certain sum, that sum bore a certain name, that at least two and possibly three persons were involved, that they were driving a certain automobile, and he had a description of two of the suspects from a FBI wanted bulletin, he had a full description of the suspects from a motel operator, and he knew that an attempt had been made to pass one of the stolen money orders just 10 minutes before he came upon the suspected vehicle and passengers at another motel, and by his own eyes he knew that the vehicle, its passengers, and the man registering at the desk fit the given description, probable cause to arrest existed. United States v. Lyles, 488 F.2d 290, 1974 U.S. App. LEXIS 10522 (5th Cir. Miss.), cert. denied, 419 U.S. 851, 95 S. Ct. 92, 42 L. Ed. 2d 82, 1974 U.S. LEXIS 2556 (U.S. 1974).

Where there was no doubt that a crime had been committed, and defendant had been seen by numerous witnesses about the time the crime was committed near where footprints were found on an embankment going to the victim's house, there existed probable cause of his arrest. Evans v. State, 275 So. 2d 83, 1973 Miss. LEXIS 1342 (Miss. 1973), but see Hall v. State, 427 So. 2d 957, 1983 Miss. LEXIS 2444 (Miss. 1983).

When a police officer observed that the defendant was wearing a concealed weapon it was his duty to arrest the defendant who was obviously committing a misdemeanor in his presence. Chandler v. State, 272 So. 2d 641, 1973 Miss. LEXIS 1537 (Miss. 1973).

Where an officer knew that the defendant had committed a misdemeanor and had also run up a large bill at a motel under a fictitious name, it was more likely that the defendant had committed the felony of false pretenses; Thus there was probable cause to arrest, based upon the misdemeanor charge. United States v. Atkinson, 450 F.2d 835, 1971 U.S. App.

LEXIS 7680 (5th Cir. Miss. 1971), cert. denied, 406 U.S. 923, 92 S. Ct. 1790, 32 L. Ed. 2d 123, 1972 U.S. LEXIS 2689 (U.S. 1972).

Where police officers knew that a rape had been committed, and had a description of the assailant's physical characteristics and clothing, which matched the appearance of the defendant and the clothing he was wearing, and where they observed that there was blood on the defendant's trousers, and that his elbow had been skinned, the officers had ample probable cause to arrest the defendant without a warrant. Baylor v. State, 246 So. 2d 516, 1971 Miss. LEXIS 1402 (Miss. 1971).

Where immediately after the robbery of a store, persons were seen running from the direction of the store and then fleeing in a white automobile with California license plates, and the automobile appeared to have a burned place on the side, and shortly thereafter an automobile of such description was stopped at a highway patrol roadblock, the occupants of the automobile were lawfully arrested on ample probable cause. Dorsey v. State, 243 So. 2d 550, 1971 Miss. LEXIS 1514 (Miss. 1971).

Police officers who visited the scene of a burglary, received a description of a suspect, discovered an out-of-state automobile parked at the rear of the premises and later observed the defendant running from the wooded area at the rear of the burglarized premises, stop in some bushes, and then run toward the automobile, had probable cause to arrest the defendant whose appearance corresponded to the description which the officers had. Powe v. State, 235 So. 2d 920, 1970 Miss. LEXIS 1471 (Miss. 1970).

Where a police officer observed the defendant's automobile making an illegal turn, and watched it as it proceeded in an erratic manner, crossing the center line and running off the pavement at times, and where, after stopping the automobile, the officer detected an odor of intoxicating liquor about the defendant, and noted that the defendant's speech was impaired, the officer acted lawfully in stopping the automobile and arresting the defendant for making an illegal turn and for driving while under the influence of intoxicating liquor. Hogan v. State, 235 So. 2d 704, 1970 Miss. LEXIS 1462 (Miss. 1970), cert. denied, 401 U.S. 977, 91 S. Ct. 1204, 28 L. Ed. 2d 327, 1971 U.S. LEXIS 2712 (U.S. 1971).

Where an arresting officer knew that the robbery of a music store was committed by at least three Negro men, knew that a Negro man riding in an automobile of a given description had a few days previously acted so suspiciously at the store that the police were notified, and knew that a car of a given description had been operating in the area with a stolen license tag and that in the robbery a large number of coins had been stolen from the store, the officer had probable cause to stop an automobile answering the given description which he observed "riding low", as though weighted down in the rear, some three hours after the robbery, and to arrest four male Negro occupants. Bogard v. State, 233 So. 2d 102, 1970 Miss. LEXIS 1646 (Miss. 1970).

Police officers, who were informed by a motel manager that the defendant had registered at the motel under the name of a certain person and had paid his bill with a credit card issued to that person and that upon phoning the issuer of the card the manager had been informed that the card was one reported stolen, and who found the defendant in the room registered in the name of that person, had reasonable ground under Mississippi law to believe that a forgery had been committed in connection with the use of a stolen credit card and that the defendant had committed it, so that they could lawfully arrest the defendant without a warrant. United States v. Lowery, 436 F.2d 1171, 1970 U.S. App. LEXIS 5996 (5th Cir. Miss. 1970), cert. denied, 401 U.S. 978, 91 S. Ct. 1208, 28 L. Ed. 2d 329, 1971 U.S. LEXIS 2727 (U.S. 1971).

After the defendant had confessed to an indictable offense, the interrogating officer had sufficient grounds upon which to arrest him and thereafter to take the picture and fingerprints of the defendant. Smith v. State, 229 So. 2d 551, 1969 Miss. LEXIS 1246 (Miss. 1969).

Where the arresting officer had been informed by one of the participants in a drugstore robbery of the identity and whereabouts of the defendant and the remainder of the stolen goods and drugs, the officer had reasonable ground to suspect and believe that the defendant had committed the felony of illegal possession of narcotic drugs and, not only had the right to arrest the defendant but also to search his motel room as an incident of the arrest. Meeks v. Hughes, 228 So. 2d 582, 1969 Miss. LEXIS 1391 (Miss. 1969).

The presence of narcotics in bottles which the defendant dropped when confronted by officers conducting an investigation of the burglary of a drugstore, provided the officers with probable cause to arrest the defendant. Branning v. State, 222 So. 2d 667, 1969 Miss. LEXIS 1539 (Miss. 1969).

When the sheriff of Forrest County discovered that the defendant was aiding a felon to escape, he had "reasonable cause" and sufficient grounds to believe that the defendant had taken the fleeing felon out of Forrest County knowing that he was a fleeing felon, and, as a private person, the sheriff had a right to arrest the defendant in Stone County on probable cause. Brown v. State, 217 So. 2d 521, 1969 Miss. LEXIS 1569 (Miss. 1969).

State police officers' knowledge that defendant had offered a used pickup truck for which he possessed no evidence of title to a dealer at a ridiculously low price constituted probable cause, and supported their arrest of the defendant without a warrant when they spotted him driving a vehicle whose description corresponded to that of the truck he had previously offered for sale. Lathers v. United States, 396 F.2d 524, 1968 U.S. App. LEXIS 6801 (5th Cir. Miss. 1968).

A police officer, reliably informed that a felony had occurred and provided with a description of the automobile observed at the scene of the crime had probable cause to stop a vehicle answering the general description and to arrest its occupants without a warrant; and the examination of the operator's license of the driver did not constitute a pretext for stopping the car but was a natural incident to the arrest. McCollum v. State, 197 So. 2d 252, 1967 Miss. LEXIS 1523 (Miss. 1967).

Sheriff's search of defendant's premises was not unreasonable and he could have arrested the defendant without a warrant had he been at home, and his testimony in homicide prosecution as to what he found at the scene of the crime on defendant's premises without a search warrant was properly admitted, where deceased's body was found by the road side and sheriff followed trail from body to the home of accused where he discovered that the yard had recently been thoroughly cleaned, blood near the front steps covered with ashes, a smouldering fire in the back yard wherein many things, including clothes, had been burned, and blood stained blocks of wood hidden in a hollow tree, since the sheriff had probable cause to believe that a felony had been committed. Leflore v. State, 197 Miss. 337, 22 So. 2d 368, 1945 Miss. LEXIS 294 (Miss. 1945).

Firing into house in nighttime with knowledge that house was occupied and that persons were sleeping therein was done in commission of act evincing a reckless disregard for human life, and with intent to injure some person therein, and town marshal living in house had such probable cause to believe that person firing gun had committed felony as would warrant marshal in arresting person without warrant. Lee v. State, 179 Miss. 122, 174 So. 85, 1937 Miss. LEXIS 14 (Miss. 1937).

Evidence that defendant checked out of hotel on night of burglary and had driven about town late at night, and had applied to physician for narcotics, showed probable cause for arrest without warrant for burglarizing drug store. Millette v. State, 167 Miss. 172, 148 So. 788, 1933 Miss. LEXIS 123 (Miss. 1933).

11. —Lacking in particular situations.

The defendant's arrest was illegal where the only information upon which the arresting officer acted was that a young child was missing and that the defendant babysat the child the night before; however, the improper admission of evidence recovered after the arrest was harmless as such evidence added absolutely nothing inculpatory to the case. Brewer v. State, 725 So. 2d 106, 1998 Miss. LEXIS 345 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143

L. Ed. 2d 365, 1999 U.S. LEXIS 2032 (U.S. 1999).

In a prosecution for burglary of a courthouse, the arresting officer was without reasonable grounds to "suspect and believe" that defendant had committed the "felony", as required by this section, where a third party was taken into custody after a second officer heard strange noises coming from a vacant home next to the courthouse, the second officer managed to effect an arrest of one of two men seen at the house, the first officer knew that a large sum of cash was found on the person of the third party arrested at the house, the first officer subsequently returned to the area of the abandoned house where he observed defendant lawfully driving at a point about 100 yards from where the arrest of the third party had occurred, and such officer then arrested defendant without any knowledge that the courthouse had been burglarized. Rome v. State, 348 So. 2d 1026, 1977 Miss. LEXIS 2120 (Miss. 1977).

Where probable cause for arrest terminated when a gun barrel was measured and found to be lawful, the subsequent discovery of contraband drugs on the arrested person was the result of an illegal search and it would not be retroactive to strengthen in any way the factors indicative of probable cause existing at the time of the arrest, and the drugs were not admissible in evidence. Carroll v. Carroll, 277 So. 2d 435, 1973 Miss. LEXIS 1416 (Miss. 1973).

The fact that the sheriff looked through the window of an automobile and observed unconcealed ordinary tools lying on the back seat and the floor board did not constitute the crime of possession of burglary tools and did not constitute probable cause for the search and seizure of the automobile and the arrest of the defendant and his companions. Pamphlet v. State, 271 So. 2d 403, 1972 Miss. LEXIS 1274 (Miss. 1972).

The fact that a person had been seen in drug store some time prior to the time the store was burglarized did not constitute reasonable ground for believing that he had committed the burglary, so as to authorize the officer to arrest the suspect without warrant and seize narcotics found in possession. Branning v. State, 215 Miss. 223, 60 So. 2d 633, 1952 Miss. LEXIS 556 (Miss. 1952).

Where a deputy sheriff, having no probable cause to believe that car was being used in transportation of liquor, and without a search warrant, searched the car, the car owner was entitled to damages. State use of Brooks v. Wynn, 213 Miss. 306, 56 So. 2d 824, 1952 Miss. LEXIS 365 (Miss. 1952).

Arrest without warrant of one on whom could be detected the odor of whiskey, but who was not under the influence of intoxicants, was not justified either because he was boisterous in a cafe or carried a small package of meat under his arm which the arresting officer may have thought contained intoxicating liquor. Shedd v. State, 203 Miss. 544, 33 So. 2d 816, 1948 Miss. LEXIS 305 (Miss. 1948).

A sheriff having reliable information that a felony had been committed at a house was not justified in concluding that there was probable cause to believe the the Negroes who ran from the house when the sheriff and his posse approached the next morning, because they ran, had participated in the felony. Hubbard v. State, 202 Miss. 229, 30 So. 2d 901, 1947 Miss. LEXIS 263 (Miss. 1947).

12. Arrest by private person.

In a suit by plaintiff against defendants, a casino and one of its employees, the circuit court did not err in granting defendants' motion for a directed verdict on plaintiff's intentional torts claims, including assault and battery by the casino and its employee because plaintiff was threatened only with removal and arrest; the casino had a right to remove him and probable cause to initiate his arrest; and there was a valid citizen's arrest by the employee, which shielded the employee from civil liability. Lee v. MGM Resorts Miss., Inc., 200 So. 3d 1129, 2016 Miss. App. LEXIS 57 (Miss. Ct. App.), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 401 (Miss. 2016).

Florida procedure whereby person arrested without warrant and charged by information was denied judicial determination of probable cause for pretrial restraint was held violative of the Fourth

Amendment to the United States Constitution. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54, 1975 U.S. LEXIS 29 (U.S. 1975).

A private citizen cannot arrest without a warrant for a misdemeanor theretofor committed unless pursuit for the purpose of arrest was begun immediately, since the power to arrest without a warrant for a breach of the peace or other minor offense is given in order to maintain the public peace, and it therefore ceases when the offense is an accomplished fact which can no longer be prevented and public order has been restored. Protective Life Ins. Co. v. Spears, 231 So. 2d 510, 1970 Miss. LEXIS 1599 (Miss. 1970).

Where officers had probable cause to believe that a felony had been committed and that the defendant was the guilty party their arrest of the defendant in a county beyond their territorial jurisdiction was lawful since, under the facts stated, a private citizen had the right to make the arrest. Nash v. State, 207 So. 2d 104, 1968 Miss. LEXIS 1603 (Miss. 1968).

Statements by several persons present in a poolroom that a certain person was seen, while the one in charge was absent, to go behind the counter where a cashbox was kept, constitute reasonable ground to believe that money found missing was taken by him, so as to give the poolroom proprietor the right to arrest him. Williams v. Clark, 236 Miss. 423, 110 So. 2d 365, 1959 Miss. LEXIS 335 (Miss. 1959).

An arrest by the owner of money of one whom he had reasonable cause to believe to have taken it from a cash-box, cannot be justified as an exercise of the statutory right to arrest, where such owner's purpose in seeking the other out was to recover the money, the arrest was made only after he failed to do so, and he did not inform the person arrested of the object and cause of the arrest. Williams v. Clark, 236 Miss. 423, 110 So. 2d 365, 1959 Miss. LEXIS 335 (Miss. 1959).

In order to justify an arrest for a misdemeanor, by a private person or an officer, without a warrant, the entire body of the crime must have taken place in the presence, or the hearing and presence, of such private person or officer; a necessary element of the crime cannot be supplied either by the confession of the accused or by information from an outside source. Walker v. State, 188 Miss. 177, 189 So. 804, 1939 Miss. LEXIS 2 (Miss. 1939).

A statute authorizing a private person to arrest without a warrant a person who has committed a felony, though not in his presence, requires person to have probable cause to believe that a felony has been committed and that person arrested is guilty one. Howell v. Viener, 179 Miss. 872, 176 So. 731, 1937 Miss. LEXIS 82 (Miss. 1937).

13. Admissibility of evidence.

Defendant's conviction for the burglary of a dwelling was proper where the trial judge did not abuse his discretion in admitting the testimony of the deputy about his conversation with or questioning of defendant prior to the arrest because defendant was not under arrest at the time he was initially questioned by the deputy. Henderson v. State, 853 So. 2d 141, 2003 Miss. App. LEXIS 497 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 60 (Miss. 2004).

The defendant's arrest was illegal where the only information upon which the arresting officer acted was that a young child was missing and that the defendant babysat the child the night before; however, the improper admission of evidence recovered after the arrest was harmless as such evidence added absolutely nothing inculpatory to the case. Brewer v. State, 725 So. 2d 106, 1998 Miss. LEXIS 345 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365, 1999 U.S. LEXIS 2032 (U.S. 1999).

Defendant's motion to suppress should have been granted and contraband found in his automobile should not have been admitted at trial over defendant's objection, where his arrest, which was without warrant, preceded the discovery of marijuana in his automobile, and was made at time when officers had less than probable cause to arrest, was illegal. Floyd v. State, 500 So. 2d 989, 1986 Miss. LEXIS 2787 (Miss. 1986), cert. denied, 484 U.S. 816, 108 S. Ct. 68, 98 L. Ed. 2d 32, 1987 U.S. LEXIS 3558 (U.S. 1987).

Where a crime had been committed, the persons who committed the crime were fleeing from the scene of the crime in an automobile, the defendants were apprehended because of a traffic violation, and when it appeared that they were apparently the persons who were said to have committed the crime, it became the duty of the officer to detain them, and when they were identified, it became the duty of the sheriff to arrest them, and after they were arrested, it was his duty to search for weapons, evidence of the crime for which they were arrested, and means of escape, or other means by which they could injure themselves or others, and any other evidence obtained by the search was admissible in the trial. Chapman v. State, 284 So. 2d 525, 1973 Miss. LEXIS 1265 (Miss. 1973).

Where probable cause for arrest terminated when a gun barrel was measured and found to be lawful, the subsequent discovery of contraband drugs on the arrested person was the result of an illegal search and it would not be retroactive to strengthen in any way the factors indicative of probable cause existing at the time of the arrest, and the drugs were not admissible in evidence. Carroll v. Carroll, 277 So. 2d 435, 1973 Miss. LEXIS 1416 (Miss. 1973).

When a crime had recently been committed in the area and a police officer came upon the defendant and observed that he was wearing a concealed weapon, the officer had no choice but to arrest the defendant or prevent him from using his gun and to prevent a breach of the peace; and evidence obtained from a search of the defendant was admissible in court. Chandler v. State, 272 So. 2d 641, 1973 Miss. LEXIS 1537 (Miss. 1973).

Where an accused had been observed sitting in his vehicle in the parking area of a restaurant with his head down on the steering wheel, and a sheriff upon being notified of this, pursued the defendant in his vehicle after the defendant left the restaurant area, the sheriff did not have probable cause to arrest the defendant at the time he began his pursuit in his own unmarked vehicle, and proof of the defendant's conduct in attempting to elude the sheriff and in exchanging shots with the sheriff should have been excluded in a prosecution for assault with a deadly weapon. Pollard v. State, 233 So. 2d 792, 1970 Miss. LEXIS 1674 (Miss. 1970).

Where the defendant was arrested in his automobile by city police outside the city limits, on a misdemeanor charge of switching automobile tags, and later, while defendant was incarcerated, the police conducted searches of the defendant's automobile without having obtained a search warrant, the searches were unlawful, and evidence seized in such searches was inadmissible in a prosecution of the defendant on a charge of felonious possession of narcotic drugs. Mellen v. Mellen, 230 So. 2d 209, 1970 Miss. LEXIS 1540 (Miss. 1970).

Where a police officer had probable cause to arrest the defendant, a pistol which the defendant voluntarily relinquished upon the officer's request, was properly admitted into evidence at the murder prosecution. Ray v. R. G. Le Tourneau, Inc., 220 So. 2d 837, 1969 Miss. LEXIS 1481 (Miss. 1969).

Where a police officer, informed that there had been a shooting, talked to the victim of the shooting, examined the premises where the shooting was said to have occurred, and talked to witnesses present at the time of the shooting before arresting the defendant, the officer should have been permitted to testify as to the facts which prompted him to make the arrest. Ray v. R. G. Le Tourneau, Inc., 220 So. 2d 837, 1969 Miss. LEXIS 1481 (Miss. 1969).

A pistol seized in the course of an unlawful search of defendant's automobile should not have been admitted in evidence on his trial for possession of a concealed weapon. Butler v. State, 212 So. 2d 573, 1968 Miss. LEXIS 1289 (Miss. 1968).

The temporary detention of a defendant for fingerprinting in the course of an investigation without his being booked, charged, or incarcerated did not constitute an arrest, and evidence derived therefrom was not inadmissible at the defendant's trial on charges of burglary and assault and battery with intent to kill. Reeves v. Reeves, 210 So. 2d 780, 1968 Miss. LEXIS 1521 (Miss. 1968).

Nine one dollar bills, unusual in that the inscription "In God We Trust" was not imprinted on them, removed from the person of the defendant following his arrest without a warrant by an officer who had reasonable cause to believe that a felony had been committed and reasonable cause to believe that the defendant committed it, were admissible in evidence. Bradshaw v. State, 192 So. 2d 387, 1966 Miss. LEXIS 1248 (Miss. 1966), cert. denied, 389 U.S. 941, 88 S. Ct. 299, 19 L. Ed. 2d 293, 1967 U.S. LEXIS 397 (U.S. 1967).

Where defendant testified that he was not informed by the arresting officer of the object and cause of arrest the burden shifted to the state to prove that there was probable cause for making a charge against him, and where the prosecution introduced no testimony whatsoever to refute the prima facie case of illegal detention and arrest made out by the defendant the testimony of one of the arresting officers as to certain admissions made to him by the defendant should have been excluded. Clay v. State, 184 So. 2d 403, 1966 Miss. LEXIS 1465 (Miss. 1966).

Where a highway patrolman, who had ample information that the crime of rape had been committed and knew that a warrant had been issued, after being stopped by a hitchhiker, whose description fitted the description of the rapist, arrested and searched the hitchhiker, the arrest, being lawful, the search incident thereto was likewise lawful, and the evidence obtained thereby was admissible. Shay v. State, 229 Miss. 186, 90 So. 2d 209, 1956 Miss. LEXIS 599 (Miss. 1956).

If an arrest is unlawful, then the search is unlawful and the evidence obtained in the search is not admissible. Smith v. State, 228 Miss. 476, 87 So. 2d 917, 1956 Miss. LEXIS 535 (Miss. 1956).

Where a deputy sheriff, in whose presence the defendant sold intoxicating liquors, did not make the arrest when he saw the offense committed, but came back later to make the arrest, the deputy sheriff lost authority to arrest without a warrant and the evidence procured as the result was illegal and not permissible. Smith v. State, 228 Miss. 476, 87 So. 2d 917, 1956 Miss. LEXIS 535 (Miss. 1956).

Where it was reported to officers that a man of certain description had attempted to steal an automobile and defendant answered the description and the officers had good ground to believe that a felony had been committed, and the defendant was person who committed the crime, and consequently arrested the defendant without warrant and searched him, the evidence obtained incident to the search was admissible in prosecution for murder. Wheeler v. State, 219 Miss. 129, 63 So. 2d 517, 1953 Miss. LEXIS 377 (Miss.), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367, 1953 U.S. LEXIS 1649 (U.S. 1953).

Where two officers went upon the premises of the defendant without a search warrant and purchased intoxicating liquor, this evidence was not obtained by illegal search and was not excludable on the ground of unlawful search and seizure because no search was involved. Peebles v. State, 57 So. 2d 263 (Miss. 1952).

Where a warrant entitled the officer to search outhouse of owner and a defendant lived in the block house and ran a cafe on the land of the owner, also paid taxes and this house was between 100 and 200 yards away from house in which owner resided and operated the store, the house used by the defendant was not an outhouse, and the search of the premises, where whisky was found was illegal and the evidence was inadmissible. Thompson v. State, 213 Miss. 325, 56 So. 2d 808, 1952 Miss. LEXIS 369 (Miss. 1952).

An arrest by sheriff without a warrant of a person who has committed no crime in his presence is illegal, and a search of the person is likewise illegal and the evidence obtained thereby is inadmissible. Lewis v. State, 198 Miss. 767, 23 So. 2d 401, 1945 Miss. LEXIS 245 (Miss. 1945).

Arrest of defendant and the search of her person by a sheriff without a warrant therefor was illegal, and consequently evidence that he found on her person a key which fitted the lock of the door to a room in which whisky was found was inadmissible in prosecution for unlawful possession of whisky, notwithstanding that the room was in a house owned by the defendant and for which the sheriff had a proper search warrant, where the defendant lived elsewhere. Lewis v. State, 198 Miss. 767, 23 So. 2d 401, 1945 Miss. LEXIS 245 (Miss. 1945).

Arrest of defendants, charged with larceny, for trespass not committed in officer's presence, held unlawful, and therefore evidence obtained by search of automobile was inadmissible in larceny prosecution. Fletcher v. State, 159 Miss. 41, 131 So. 251, 1930 Miss. LEXIS 363 (Miss. 1930).

An officer who unlawfully enters the premises of a person charged with a misdemeanor not committed in his presence and who has no warrant for the arrest and who finds liquor in said person's possession cannot afterwards give evidence of finding said liquor over the defendant's objection. Iupe v. State, 140 Miss. 279, 105 So. 520, 1925 Miss. LEXIS 260 (Miss. 1925).

14. Instructions.

In a prosecution for aggravated assault arising out of an attack upon a police constable who was in the process of arresting the defendant's brother-in-law, the trial court erred in refusing an instruction of the defense that a person has the right to use reasonable force to resist an unlawful arrest or to aid another in resisting an unlawful arrest where the evidence established that the constable neither had possession of a warrant nor had informed the brother-in-law of the reason for his arrest and where the prosecution failed to present any evidence to show that there was probable cause for the arrest and neither the affidavit nor the arrest warrant was included in the record. Boyd v. State, 406 So. 2d 824, 1981 Miss. LEXIS 2438 (Miss. 1981).

Instruction that town marshal did an unlawful act when he fired into automobile while attempting to arrest occupants who had immediately prior thereto fired into marshal's house with reckless disregard of human life and with intent to injure some person therein held reversible error, since marshal was warranted in making arrest, under statutes, without warrant. Lee v. State, 179 Miss. 122, 174 So. 85, 1937 Miss. LEXIS 14 (Miss. 1937).

In action for false imprisonment of plaintiff alleged to be drunk and disorderly, instructions that if officers had good reason to believe plaintiff was committing crime, they were not liable, held properly refused. Carlisle v. Laurel, 156 Miss. 410, 124 So. 786, 1929 Miss. LEXIS 366 (Miss. 1929).

In action for false imprisonment, instruction to find for plaintiff, unless plaintiff committed crime in defendant's presence, held not too narrow in view of other instructions. Harris v. Sims, 155 Miss. 207, 124 So. 325, 1929 Miss. LEXIS 276 (Miss. 1929).

Refusal of instructions relating to manslaughter if defendant killed deceased while resisting unlawful search held not erroneous, in view of defense. Richardson v. State, 153 Miss. 654, 121 So. 284, 1929 Miss. LEXIS 67 (Miss. 1929).

15. Third parties.

Defendant's belief that police conduct ultimately might be found to be unconstitutional did not give him right to refuse requests of police officers for entry, search, and arrest of arrestee, within arrestee's mother's house where defendant was a guest. Bovan v. State, 706 So. 2d 254, 1997 Miss. App. LEXIS 599 (Miss. Ct. App. 1997).

Observers of progress of arguably illegal police conduct do not have independent right to interfere with it. Bovan v. State, 706 So. 2d 254, 1997 Miss. App. LEXIS 599 (Miss. Ct. App. 1997).

Fundamental correctness of planned police conduct is not for observer-citizen to decide; proper place to examine reasonableness of ultimate police action is in court. Bovan v. State, 706 So. 2d 254, 1997 Miss. App. LEXIS 599 (Miss. Ct. App. 1997).

16. Jurisdiction.

The supreme court has initial jurisdiction over a post-conviction proceeding where that court is the one that last exercised jurisdiction in the case. Perry v. State, 759 So. 2d 1269, 2000 Miss. App. LEXIS 256 (Miss. Ct. App. 2000).

17. Illustrative cases.

Youth court did not err in adjudicating defendant juvenile a delinquent child for resisting arrest because the officer's actions in arresting defendant for disorderly conduct were lawful as defendant failed to obey the officer's commands to show his hands or to place his hands on the car under circumstances that could lead to a breach of the peace; and the evidence introduced at the delinquency hearing showed that defendant resisted arrest as he struggled and would not put his arms behind his back, and some of the other officers ultimately tased defendant to gain compliance. S.M.K.S. v. Youth Court of Union County, 155 So. 3d 747, 2015 Miss. LEXIS 39 (Miss. 2015).

OPINIONS OF THE ATTORNEY GENERAL

As an officer can usually make misdemeanor arrests only when a crime occurred in his presence, a merchant arresting a shoplifter should, instead of turning the arrest over to an officer, file an affidavit charging the accused with shoplifting. Henderson, Feb. 12, 1992, A.G. Op. #91-0946.

If judge is satisfied that sufficient evidence has been presented to establish probable cause, then judge may sign original warrant and FAX copy to law enforcement, and FAX would constitute official channels communication; original warrant should be delivered to clerk of court as soon as possible. Bankston, Oct. 28, 1992, A.G. Op. #92-0807.

This section states that officer may only make warrantless arrest for misdemeanor when misdemeanor has been committed in presence of officer; officer must have warrant in order to arrest for misdemeanor that was not committed in his or her presence, except for domestic violence crimes pursuant to subsection 3 of this section. Gentry, June 7, 1993, A.G. Op. #93-0362.

Best procedure to follow in most cases where security guard witnesses crime is for guard to file affidavit against perpetrator in municipal or justice court and then if court believes that probable cause exists, court may then issue warrant for such person's arrest and any law enforcement officer would then be fully authorized to make arrest. Norman, August 4, 1993, A.G. Op. #93-0466.

An officer who has probable cause to believe a felony was committed by a certain individual may make an arrest without a warrant. Graham, Nov. 14, 1997, A.G. Op. #97-0726.

An officer who has probable cause to believe a felony was committed by a certain individual may make an arrest without a warrant. King, May 8, 1998, A.G. Op. #98-0253.

The statute provides the powers of arrest for law enforcement officers and private citizens, which would include private security officers. Conerly, July 24, 1998, A.G. Op. #98-0394.

While officers are mandated to make an arrest if the incident occurred within 24 hours, nothing specifies that the sworn affidavit or complaint must be filed within the 24-hour time period as well; thus, the officer may still sign an affidavit, and the arrest is still valid, even though 24 hours may have passed since the time of the arrest. Anderton, March 17, 2000, A.G. Op. #2000-0128.

An officer may not make a misdemeanor arrest without a warrant being issued unless the offense is committed in the officer's presence or the offense is an act of domestic violence that has occurred within 24 hours of the arrest. Stewart, March 24, 2000, A.G. Op. #2000-0145.

"Family or household member", as that term is used in Sections 97-3-7 and 99-3-7, includes individuals who are married, were married, or who live together in a relationship, although not married; further, it is not limited to a blood relationship and can relate to an in-law relationship or other relatives of one spouse living in the household; however, "boyfriend-girlfriend" (or any other variation of this) relationships are not included in the definition of "family or household member", unless the persons reside or resided together as spouses; finally, although not falling into the definition of "family or household member", if the individuals have a biological or legally adopted child between them, the relationship is also protected. Carrubba, Oct. 6, 2000, A.G. Op. #2000-0588.

The violation of a protective order issued by a municipal court is sufficient to support a warrantless arrest of the violator; further, the relevant statutory language is broadly drafted and includes violation of a restraining order issued during a criminal prosecution for a domestic violence offense by any court with jurisdiction over the offense. Carrubba, Oct. 6, 2000, A.G. Op. #2000-0588.

The statute places the burden on law enforcement to file the charges following a warrantless arrest. Carrubba, Oct. 6, 2000, A.G. Op. #2000-0588.

Any individual violating a restraining order or injunction issued under the Protection from Domestic Abuse Law or a similar order from a foreign court may be arrested without a warrant and charged with a violation of § 93-21-21. Dantin, Apr. 26, 2002, A.G. Op. #02-0212.

When a security guard or private citizen makes an arrest pursuant to this section, it is possible, although not mandated, for a law enforcement officer to continue that arrest. The law enforcement officer could transport the detainee to an appropriate location, i.e., justice court or jail and secure a warrant based on the citizen's affidavit or release the detainee if the court does not find probable cause to issue a warrant. Beshears, May 28, 2004, A.G. Op. 04-0219.

Police officers may make arrests on misdemeanor warrants without having the warrants in hand and officers may also arrest persons on outstanding felony warrants without possessing the actual warrant. Daughdrill, July 22, 2005, A.G. Op. 05-0308.

RESEARCH REFERENCES

ALR.

Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace. 58 A.L.R.2d 1056.

Police officer's power to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor. 76 A.L.R.2d 1432.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 A.L.R.4th 328.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence. 81 A.L.R.4th 1031.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used. 82 A.L.R.4th 598.

Application of "plain feel" exception to warrant requirements–state cases. 50 A.L.R.5th 581.

Am. Jur.

5 Am. Jur. 2d, Arrest §§ 30 et seq.

9 Am. Jur. Proof of Facts 2d, Police Officer's Use of Excessive Force in Making Arrest, §§ 12 et seq. (proof that police officer, in making an arrest for a misdemeanor and later a felony, used excessive force).

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Practice References.

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§ 99-3-9. Arrest of defendants in presence of court without process.

After an indictment is returned into court by the grand jury, the court may direct any defendant who has not been arrested to be taken into custody in the presence of the court, without process therefor.

HISTORY: Codes, 1857, ch. 64, art. 261; 1871, § 2798; 1880, § 3009; 1892, § 1350; 1906, § 1422; Hemingway's 1917, § 1178; 1930, § 1202; 1942, § 2445.

OPINIONS OF THE ATTORNEY GENERAL

A criminal warrant does not have a return date. However, if a defendant's bond is made returnable to a plea date, such a date would constitute the return day of process. If a defendant pleads not guilty on the plea date, the court should inquire if the defendant demands a jury trial. If the bond is returnable to a trial date, the trial date is considered the return day of process and the defendant could demand a jury trial at any time until the trial begins. Hood, Sept. 17, 2004, A.G. Op. 04-0455.

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Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

§ 99-3-11. Arresting officer or person may break into house.

To make an arrest an officer or private person, after notice of his office and object, if admittance is refused, may break open a window or outer or inner door of any dwelling or house in which he has reason to believe the offender may be found.

HISTORY: Codes, 1857, ch. 64, art. 277; 1871, § 2777; 1880, § 3027; 1892, § 1376; 1906, § 1448; Hemingway's 1917, § 1205; 1930, § 1228; 1942, § 2471.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Hot pursuit.

1. In general.

Where a police officer was pursuing the defendant in an effort to arrest him for an offense committed in the officer's presence, the officer had the right to enter the defendant's house in continuance of the hot pursuit of the defendant and to use force, if necessary, in order to do so. Watts v. State, 305 So. 2d 348, 1974 Miss. LEXIS 1479 (Miss. 1974).

In his trial for murder of a police officer, defendant's contention that the homicide was justifiable because he was resisting an unlawful arrest and reasonably believed himself to be in imminent danger of great bodily harm was not supported by the evidence, where the law officers had sufficient grounds to believe that fugitives for whom they had arrest warrants were located in the house in which defendant was staying and fired gas into the house only after a reasonable time had elapsed following the announcements requesting the occupants to vacate the house; failure of the occupants to exit as requested demonstrated their refusal to cooperate with the arresting officers who had identified themselves and stated their purpose, and the officers were warranted in using reasonable force and means to execute the arrest warrants. Norman v. State, 302 So. 2d 254, 1974 Miss. LEXIS 1416 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453, 1975 U.S. LEXIS 1588 (U.S. 1975).

When the sheriff of Stone County in his search for a felon who had fled from Forrest County found that the suspect was in a room in a motel in his jurisdiction, he had probable cause to enter the fleeing felon's motel room and arrest him, and it became his duty to make a search of the prisoner, his personal effects, and the immediate surroundings where the arrest was made. Brown v. State, 217 So. 2d 521, 1969 Miss. LEXIS 1569 (Miss. 1969).

An officer cannot enter the home of one charged with crime after the defendant has been arrested and incarcerated in jail without his consent or without a valid search warrant. May v. State, 199 So. 2d 635, 1967 Miss. LEXIS 1308 (Miss. 1967).

When an officer is required to go into a dwelling house or a place for the purpose of making an arrest, he may observe the surrounding scene of the alleged crime, and make a search of the person arrested and of the surroundings, and in so doing he may take pictures of the area, and may seize elements of the crime, including weapons, and articles that may be employed by the offender to make an escape. May v. State, 199 So. 2d 635, 1967 Miss. LEXIS 1308 (Miss. 1967).

Evidence of killing of constable, when constable, armed with void search warrant, after search had been made, forcibly entered defendant's house without permission and without stating his purpose, held not to authorize conviction for crime higher than manslaughter. Jones v. State, 170 Miss. 581, 155 So. 430, 1934 Miss. LEXIS 176 (Miss. 1934).

A person having a warrant for the arrest of a criminal may enter any house in which he has reason to believe and does believe said criminal is, without being liable to the owner of the premises searched. Monette v. Toney, 119 Miss. 846, 81 So. 593, 1919 Miss. LEXIS 183 (Miss. 1919).

2. Hot pursuit.

Detective had both exigent circumstances and probable cause to make the warrantless entry into the residence and arrest defendant after investigating the reliable anonymous tip concerning drug activity and going in hot pursuit of defendant after he fled from lawful questioning about that tip. Cooper v. State, 145 So. 3d 1219, 2013 Miss. App. LEXIS 686 (Miss. Ct. App. 2013), aff'd, 145 So. 3d 1164, 2014 Miss. LEXIS 433 (Miss. 2014).

RESEARCH REFERENCES

ALR.

Police officer's to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor. 76 A.L.R.2d 1432.

Am. Jur.

5 Am. Jur. 2d, Arrest §§ 67 et seq.

CJS.

6A C.J.S., Arrest §§ 10 et seq.

Practice References.

Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

§ 99-3-13. Officer may pursue and apprehend offender any place in state; jailing prisoner for safekeeping.

If a person commit an offense and be pursued by a sheriff or constable, and escape from the county of the officer, the officer may pursue and apprehend him in any county and take him to the county in which the offense was committed; and in all cases an officer or other person having the lawful custody of a prisoner, passing through any county on his route, may lodge the prisoner in any jail for safekeeping, as circumstances require. In like manner if a person commit an offense within the corporate limits of an incorporated municipality and be pursued by a marshal or any other municipal peace or police officer and shall escape from the municipality, such municipal peace or police officer may pursue and apprehend such offender to places without the corporate limits of the municipality and to any place within the State of Mississippi to which such person may flee and may return such person to the municipality in which such offense was committed.

HISTORY: Codes, 1880, § 3034; 1892, § 1382; 1906, § 1454; Hemingway's 1917, § 1211; 1930, § 1234; 1942, § 2477; Laws, 1948, ch. 434.

Cross References — Arrest of convicted offender receiving parole or suspended sentence who fails to surrender himself for execution of sentence on expiration of parole or suspended sentence, see § 99-19-27.

Arrest of fugitives from justice in other states, see § 99-21-1.

JUDICIAL DECISIONS

1. In general.

Where officers had probable cause to believe that a felony had been committed and that the defendant was the guilty party their arrest of the defendant in a county beyond their territorial jurisdiction was lawful since, under the facts stated, a private citizen had the right to make the arrest. Nash v. State, 207 So. 2d 104, 1968 Miss. LEXIS 1603 (Miss. 1968).

Since the functions of the sheriff are confined to his own county, except in the case of the pursuit of an escaping offender, there can be no recovery on a sheriff's bond for the alleged unlawful treatment of one accused of crime apprehended in another state where such treatment and the event complained of occurred in such other state. McLean v. Mississippi, 96 F.2d 741, 1938 U.S. App. LEXIS 3552 (5th Cir. Miss.), cert. denied, 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399, 1938 U.S. LEXIS 805 (U.S. 1938), disapproved, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 1939 U.S. LEXIS 77 (U.S. 1939).

A sheriff of one county who is not in pursuit of an escaping offender located in another county has no authority to go out of his county, carry a deadly weapon concealed and arrest such offender. Shirley v. State, 100 Miss. 799, 57 So. 221, 1911 Miss. LEXIS 75 (Miss. 1911).

OPINIONS OF THE ATTORNEY GENERAL

Under Section 99-3-13, a municipal Police Department may authorize a municipal police officer that has also been sworn as a deputy sheriff to respond to a request for assistance by the Sheriff's Department in his capacity as a deputy sheriff. Turner, May 17, 1995, A.G. Op. #95-0247.

Although police officers of a municipality have no police authority outside the municipal limits unless acting under the hot pursuit doctrine, a city and county may enter into an interlocal agreement where the municipal police officers are also sworn as deputy sheriffs and thereby may respond to a request for assistance by the Sheriff's Department in his capacity as a deputy sheriff. Moore, July 10, 1998, A.G. Op. #98-0376.

RESEARCH REFERENCES

ALR.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit. 34 A.L.R.4th 328.

Am. Jur.
5 Am. Jur. 2d, Arrest §§ 27 et seq., 50 et seq.

Practice References.
Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

§ 99-3-15. Escaped offender may be pursued and retaken without warrant.

If an offender escape or be rescued, the person from whose possession or custody he escaped or was rescued, may immediately pursue and retake him at any time and in any county without warrant.

HISTORY: Codes, 1857, ch. 64, art. 278; 1871, § 2778; 1880, § 3028; 1892, § 1377; 1906, § 1449; Hemingway's 1917, § 1206; 1930, § 1229; 1942, § 2472.

Cross References — Escape of prisoners, see §§ 97-9-27 et seq.

Arrest of convicted offender receiving parole or suspended sentence who fails to surrender himself for execution of sentence on expiration of parole or suspended sentence, see § 99-19-27.

Arrest of fugitives from justice in other states, see § 99-21-1.

Arrests without a warrant, see MRCrP 5.2.

RESEARCH REFERENCES

Am. Jur.
5 Am. Jur. 2d, Arrest § 39.

CJS.
6A C.J.S., Arrest §§ 17 et seq.

Practice References.
Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

§ 99-3-17. Offender must be taken before proper officer without delay.

Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case, except as otherwise provided in Section 99-3-18.

HISTORY: Codes, 1857, ch. 64, art. 279; 1871, § 2779; 1880, § 3029; 1892, § 1378; 1906, § 1450; Hemingway's 1917, § 1207; 1930, § 1230; 1942, § 2473; Laws, 1980, ch. 446, § 2, eff from and after July 1, 1980.

Cross References — Handling of persons arrested by railroad police officers, see § 77-9-507.

Post-arrest release on written notice to appear at later date, see § 99-3-18.

For the notice persons under 21 must be given if released under this section following arrest, see § 99-3-45.

Defendant's initial appearance, see MRCrP 5.2.
Preliminary hearing, see MRCrP 6.1, 6.2.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Effect of delay, generally.
3. Admissibility of confession.
4. Waiver of rights.

1. In general.

There was no unnecessary delay in providing defendant with an initial appearance as required under Miss. Code Ann. § 99-3-17 because he was being held in custody on unrelated bench warrants from August 12, 2004, until August 17, he was charged with murder on August 18, and he was arraigned in court that same day. Smith v. State, 977 So. 2d 1227, 2008 Miss. App. LEXIS 157 (Miss. Ct. App. 2008).

A city police chief who arbitrarily promulgated and enforced a rule that civil rights demonstrators arrested for parading without a permit should not be taken before a magistrate violated Code 1942, § 2473. Anderson v. Nosser, 456 F.2d 835, 1972 U.S. App. LEXIS 10947 (5th Cir. Miss.), cert. denied, 409 U.S. 848, 93 S. Ct. 53, 34 L. Ed. 2d 89, 1972 U.S. LEXIS 1312 (U.S. 1972).

The purpose of a preliminary hearing is to determine whether probable cause exists to hold a person for trial, and a defendant formally indicted by a grand jury before his arrest was not entitled to a preliminary hearing. Stevenson v. State, 244 So. 2d 30, 1971 Miss. LEXIS 1324 (Miss. 1971).

A petition for writ of error coram nobis was denied where there was nothing in the record to indicate that the defendant was prejudiced by the failure to afford him a preliminary hearing. Petition of Woodruff, 253 Miss. 827, 179 So. 2d 268, 1965 Miss. LEXIS 1057 (Miss. 1965).

The requirement that an offender shall be taken before the proper officer without unnecessary delay for examination of his case is in furtherance of the legislative purpose to insure a speedy and public trial as guaranteed by § 26 of the Constitution. Jones v. State, 250 Miss. 186, 164 So. 2d 799, 1964 Miss. LEXIS 454 (Miss. 1964).

Person arrested on charge of drunkenness has no right to demand detention in any particular place, pending return to sobriety and perfection of charge, except to extent that any lodgment elsewhere than in jail of county of arrest will work unreasonably to deny accused right to obtain bail or speedy trial. State use of Kelley v. Yearwood, 204 Miss. 181, 37 So. 2d 174, 1948 Miss. LEXIS 353 (Miss. 1948).

Temporary confinement of a drunken woman in jail of county rather than county of arrest instead of taking her before officer for examination of her case is not unlawful imprisonment when the arrest is made on Sunday, prisoner is in no condition to be given a hearing, and jail in which she is confined is most convenient and suitable for detention of a woman. State use of Kelley v. Yearwood, 204 Miss. 181, 37 So. 2d 174, 1948 Miss. LEXIS 353 (Miss. 1948).

This section [Code 1942, § 2473] not only contemplates that an accused shall be given a trial of his case without unnecessary delay, but that a person arrested by an officer or private person with or without a warrant, for any indictable offense committed in his presence or where the arrest is made on probable cause or suspicion that the accused has committed a felony, shall not be detained for any unreasonable length of time without being afforded an opportunity to have a hearing on the merits of the accusation against him. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745, 1947 Miss. LEXIS 378 (Miss. 1947).

2. Effect of delay, generally.

The failure to provide a defendant with an initial appearance until five days after his arrest even though a judge was available at all times constituted reversible error where the defendant gave a confession in the absence of counsel and in violation of his right to counsel as a consequence of the delay, and the defendant's conviction for capital murder was based entirely on his confession. Abram v. State, 606 So. 2d 1015, 1992 Miss. LEXIS 448 (Miss. 1992), overruled in part, Foster v. State, 961 So. 2d 670, 2007 Miss. LEXIS 315 (Miss. 2007), overruled in part, Holly v. Mississippi, 2011 U.S. App. LEXIS 24853 (5th Cir. Miss. Dec. 13, 2011).

Although assuming, but not deciding that an unexplained three and one half day delay in affording a defendant a preliminary hearing to be undue delay, there is no authority to the effect that such delay entitled the accused to an outright discharge on the charge of armed robbery. Dunning v. State, 251 Miss. 766, 171 So. 2d 315, 1965 Miss. LEXIS 900 (Miss. 1965), cert. denied, 386 U.S. 993, 87 S. Ct. 1310, 18 L. Ed. 2d 339, 1967 U.S. LEXIS 1872 (U.S. 1967).

The failure to carry a defendant before a judicial officer without unnecessary delay for examination after his arrest does not entitle him to a directed verdict of not guilty. Harper v. State, 251 Miss. 699, 171 So. 2d 129, 1965 Miss. LEXIS 894 (Miss. 1965).

Where the state knows the identity of the accused, has the accused in custody, obtains a confession, and holds the accused in the penitentiary for a period of over eight years, during which time he has suffered many disadvantages, then the delay is vexatious, capricious, and oppressive, and the accused has been denied the speedy trial as contemplated by the constitution. Jones v. State, 250 Miss. 186, 164 So. 2d 799, 1964 Miss. LEXIS 454 (Miss. 1964).

3. Admissibility of confession.

Delay in taking the prisoner before a magistrate for a preliminary hearing did not render his confession inadmissible where there was no evidence that the delay resulted in the confession being involuntary. Dickens v. State, 311 So. 2d 650, 1975 Miss. LEXIS 1618 (Miss. 1975).

It does not follow that a violation of this section [Code 1942, § 2473] renders inadmissible a confession, freely and voluntarily made while the accused is in custody, where the confession was not induced by threats, force or promises. Parker v. State, 244 Miss. 332, 141 So. 2d 546, 1962 Miss. LEXIS 453 (Miss. 1962), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

Delay in giving a preliminary hearing may properly be considered in determining the admissibility of a confession obtained in the meantime. Tyson v. State, 237 Miss. 149, 112 So. 2d 563, 1959 Miss. LEXIS 457 (Miss. 1959).

Where an offense was committed on Saturday morning and defendant was arrested on Sunday morning and on Monday he was indicted, and where on the day of arrest neither the grand jury nor justice of peace was in session, the defendant was indicted without unnecessary delay and confession obtained was not result of any illegal detention. Robinson v. State, 223 Miss. 70, 77 So. 2d 265, 1955 Miss. LEXIS 354 (Miss.), cert. denied, 350 U.S. 851, 76 S. Ct. 91, 100 L. Ed. 757, 1955 U.S. LEXIS 553 (U.S. 1955).

In robbery prosecution the mere fact that confessions were made while defendants were in custody and before preliminary hearings were had does not render the confessions inadmissible. Winston v. State, 209 Miss. 799, 48 So. 2d 513, 1950 Miss. LEXIS 445 (Miss. 1950).

It is not necessary for arresting officer to summon member of suspect's family or friend or lawyer when arrest is made to attend interrogation to be conducted by officers and confession was not involuntary for this reason when accused was arrested in presence of his father and mother, who knew that he was being incarcerated, and there was no refusal to permit attorneys of prisoner to have access to him after they were employed in case. Moore v. State, 207 Miss. 140, 41 So. 2d 368, 1949 Miss. LEXIS 324 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516, 1949 U.S. LEXIS 1838 (U.S. 1949).

4. Waiver of rights.

Only a magistrate, at a preliminary hearing and after advising the defendant of the nature of the charge against him and permitting him to plead to it, may accept a waiver of preliminary hearing. Harper v. State, 251 Miss. 699, 171 So. 2d 129, 1965 Miss. LEXIS 894 (Miss. 1965).

The giving of an appearance bond by the defendant in a prosecution charging the defendant with being an accessory before the fact to the crime of robbery, to wait the action of the grand jury, amounted to a discontinuance of the prosecution in the justice of the peace court, and a waiver of the defendant's right under this section [Code 1942, § 2473] to be taken before that officer for a preliminary examination of his fee. De Angelo v. State, 187 Miss. 84, 192 So. 444, 1939 Miss. LEXIS 104 (Miss. 1939).

OPINIONS OF THE ATTORNEY GENERAL

After a warrantless arrest, a justice court judge must make a determination of probable cause for the arrest at the defendant's initial appearance and may issue a warrant after the fact concerning this finding or may otherwise make a record of such determination. Anderson, Aug. 8, 1997, A.G. Op. #97-0477.

A police department must bring a defendant before a judicial officer for an initial appearance immediately upon availability, and in no case may a defendant be held in custody without an initial appearance beyond 48 hours after arrest. Via, Dec. 27, 1999, A.G. Op. #99-0679.

A defendant does not have to be taken to a jail after being arrested, but may be brought before a judge to determine conditions for release. Furthermore, an individual who has been arrested may be released prior to being taken to a jail upon a written notice to appear in court. Erby, Mar. 26, 2004, A.G. Op.04-0138.

Where a preliminary hearing is provided to a defendant charged for a felony and held as a municipal prisoner, the defendant should be bound over to a grand jury and thereby become a county prisoner after the hearing, if the judge so determines. Wiggins, March 2, 2007, A.G. Op. #07-00075, 2007 Miss. AG LEXIS 78.

RESEARCH REFERENCES

ALR.

Intoxication as ground for police postponing arrestee's appearance before magistrate. 3 A.L.R.4th 1057.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment – modern cases. 28 A.L.R.4th 1121.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions–post-Connelly cases. 48 A.L.R.5th 555.

When may dismissal for violation of Speedy Trial Act (18 USCS §§ 3161-3174) be with prejudice to government's right to reinstate action. 98 A.L.R. Fed. 660.

Am. Jur.

5 Am. Jur. 2d, Arrest §§ 75 et seq.

26 Am. Jur. Proof of Facts 2d 617, False Imprisonment–Failure to Take Arrestee Before Magistrate Without Unreasonable or Unnecessary Delay.

41 Am. Jur. Trials 394, Habeas Corpus: Pretrial Motions (right to speedy trial).

Practice References.

Adams and Blinka, Prosecutor's Manual for Arrest, Search and Seizure (Michie).

John Wesley Hall, Search and Seizure, Third Edition (Michie).

§ 99-3-18. Post-arrest release on written notice to appear at later date.

(1) In any case in which a person is arrested for an offense declared to be a misdemeanor and does not demand to be taken before a municipal judge, justice court judge or other judge, such person may, instead of being taken before a judge, be released according to the procedures set forth by this section

and Section 99-3-17. If the arresting officer or his superior determines that the person should be released, such officer or superior shall prepare in duplicate a written notice to appear in court, containing the name and address of such person, the offense charged, and the time when and place where such person shall appear in court. If the person is not released prior to being booked and the officer in charge of the booking or his superior determines that the person should be released, such officer or superior shall prepare such written notice to appear in court. Unless waived by the arrested person, the time specified in the notice to appear shall be at least five (5) days after arrest. The place specified in the notice shall be the court of the municipal judge, justice court judge or other judge before whom the person would be taken if the requirement of taking an arrested person before a judge were complied with, or shall be an officer authorized by such court to receive a deposit of bail.

(2) The officer shall deliver one (1) copy of the notice to appear to the arrested person, and the arrested person, in order to secure release, shall give his written promise to appear in court by signing the duplicate notice which shall be retained by the officer. Thereupon the arresting officer shall forthwith release the person arrested from custody. The officer shall, as soon as practicable, file the duplicate notice with the municipal judge, justice court judge or other judge specified therein. No warrant shall issue on such charge for the arrest of a person who has given such written promise to appear in court, unless and until he has violated such promise or has failed to appear for trial or judgment, or to comply with the terms and provisions of the judgment, as required by law.

(3) If the arrested person is not released pursuant to the provisions of this section and Section 99-3-17 prior to being booked by the arresting agency, then at the time of booking, the officer in charge of such booking or his superior officer, or any other person designated by a city or county for this purpose may make an immediate investigation into the background of the person to determine whether he should be released pursuant to the provisions of this section and Section 99-3-17. Such investigation shall include, but need not be limited to, the person's name, address, length of residence at that address, length of residence within this state, marital and family status, employment, length of that employment, prior arrest record and such other facts relating to the person's arrest which would bear on the question of his release pursuant to the provisions of this section and Section 99-3-17.

HISTORY: Laws, 1980, ch. 446, § 1, eff from and after July 1, 1980.

Cross References — Handling of persons arrested by railroad police officers, see § 77-9-507.

Requirement that persons not released pursuant to this section be taken before proper officer without delay, see § 99-3-17.

For the notice persons under 21 must be given if released under this section following arrest, see § 99-3-45.

OPINIONS OF THE ATTORNEY GENERAL

Pursuant to Section 99-3-18, assuming an ordinance is valid, a criminal affidavit should be filed to initiate charges for violations of county ordinances passed by the Board of Supervisors. Oster, September 20, 1996, A.G. Op. #96-0614.

An officer may release a defendant that has been charged with a traffic offense and is in his custody on a written notice to appear or if that officer has been designated by the municipal judge, may take a bond, cash or otherwise, from such a defendant. Powell, Jan. 10, 2003, A.G. Op. #02-0766.

A defendant does not have to be taken to a jail after being arrested, but may be brought before a judge to determine conditions for release. Furthermore, an individual who has been arrested may be released prior to being taken to a jail upon a written notice to appear in court. Erby, Mar. 26, 2004, A.G. Op.04-0138.

A ticket/citation for non-traffic misdemeanors must be in the form of an affidavit (as is a uniform traffic citation) and must state the essential elements of the offense charged and include the ordinance or statute relied upon. Clark, Oct. 27, 2006, A.G. Op. 06-0524.

RESEARCH REFERENCES

ALR.
Admissibility of confession or other statement made by defendant as affected by delay in arraignment-modern cases. 28 A.L.R.4th 1121.

Am. Jur.
5 Am. Jur. 2d, Arrest §§ 75 et seq.

CJS.
6A C.J.S., Arrest §§ 58-61.

§ 99-3-19. Warrant good across county line.

When a person accused of any offense removes or escapes to another county, a warrant issued by a justice of the peace in the county in which the offense was committed shall authorize the arrest of such offender, and his removal to the county in which the offense was committed or is triable.

HISTORY: Codes, 1857, ch. 64, art. 333; 1871, § 2826; 1880, § 3032; 1892, § 1380; 1906, § 1452; Hemingway's 1917, § 1209; 1930, § 1232; 1942, § 2475.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

ALR.
Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records. 45 A.L.R.4th 550.

Am. Jur.
5 Am. Jur. 2d, Arrest § 28.

Law Reviews.
Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

§ 99-3-21. Justice of the peace may issue warrant for offender coming into his jurisdiction.

A justice of the peace of any county into which an offender may have removed himself or escaped, on the oath of some credible person, may issue his warrant for the arrest of such offender, returnable before any justice of the peace of the county where the offense is cognizable, which shall authorize the arrest and removal of such offender to the proper county for examination.

HISTORY: Codes, 1857, ch. 64, art. 335; 1871, § 2828; 1880, § 3033; 1892, § 1381; 1906, § 1453; Hemingway's 1917, § 1210; 1930, § 1233; 1942, § 2476.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Criminal jurisdiction of justices of the peace, see § 99-33-1.

RESEARCH REFERENCES

ALR.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations. 71 A.L.R.4th 554.

§ 99-3-23. No liability for legal arrest.

Officers and others who make arrests as authorized or required by law, shall not be liable on account thereof, civilly or criminally, notwithstanding it may appear that the party arrested was innocent of any offense.

HISTORY: Codes, 1857, ch. 64, art. 280; 1871, § 2780; 1880, § 3030; 1892, § 1379; 1906, § 1451; Hemingway's 1917, § 1208; 1930, § 1231; 1942, § 2474.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Citizen's arrest.

1. In general.

A constable who did not begin pursuit of defendant motorist until after the defendant had driven away at such a fast rate of speed his companions became alarmed for their safety was not engaged in an illegal attempt to arrest him. Shinall v. State, 199 So. 2d 251, 1967 Miss. LEXIS 1290 (Miss.), cert. denied, 389 U.S. 1014, 88 S. Ct. 590, 19 L. Ed. 2d 660, 1967 U.S. LEXIS 27 (U.S. 1967), overruled, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

In action for false imprisonment against officer who arrested plaintiff for drunkenness on public highway and had her confined in jail of county other than county of arrest, verdict for defendant will be allowed to stand where instructions taken as a whole correctly submit issue of unnecessary and unreasonable detention and failure, if any, to have plaintiff carried without delay before proper officer. State use of Kelley v. Yearwood, 204 Miss. 181, 37 So. 2d 174, 1948 Miss. LEXIS 353 (Miss. 1948).

Deputy sheriff's killing of unarmed man, whom deputy sought to arrest without warrant as he approached illicit still, when he put his hand to hip pocket instead of obeying deputy's command to raise his hands, held negligent, unnecessary, and wrongful act rendering deputy, the sheriff, and the surety on latter's bond liable to deceased's widow and children for damages as matter of law. Hinton v. Sims, 171 Miss. 741, 158 So. 141, 158 So. 778, 1934 Miss. LEXIS 276 (Miss. 1934).

Where plaintiff proved arrest and detention without warrant, burden of proof shifted to defendant to prove justification for arrest. Harris v. Sims, 155 Miss. 207, 124 So. 325, 1929 Miss. LEXIS 276 (Miss. 1929).

Officer arresting person without warrant, mistaking him for one wanted for crime, and putting him in jail over his protest, is liable therefor, he making no misstatements or misrepresentations leading to his arrest. Vice v. Holley, 88 Miss. 572, 41 So. 7, 1906 Miss. LEXIS 163 (Miss. 1906).

2. Citizen's arrest.

In a suit by plaintiff against defendants, a casino and one of its employees, the circuit court did not err in granting defendants' motion for a directed verdict on plaintiff's intentional torts claims, including assault and battery by the casino and its employee because plaintiff was threatened only with removal and arrest; the casino had a right to remove him and probable cause to initiate his arrest; and there was a valid citizen's arrest by the employee, which shielded the employee from civil liability. Lee v. MGM Resorts Miss., Inc., 200 So. 3d 1129, 2016 Miss. App. LEXIS 57 (Miss. Ct. App.), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 401 (Miss. 2016).

RESEARCH REFERENCES

ALR.

Penalties for common-law criminal offense of false imprisonment. 67 A.L.R.4th 1103.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence. 81 A.L.R.4th 1031.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used. 82 A.L.R.4th 598.

Am. Jur.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 22.3 (Complaint, petition, or declaration-Unreasonable detention and search of customer on accusation of shoplifting).

§ 99-3-25. Duty of officers to arrest gamblers, bucket-shop operators and futures dealers.

It shall be the duty of the sheriff, justices, constables, and all other civil officers of the county, and of every police officer of any city, town or village, when they know or have reason to suspect any person to be guilty of a violation of the provisions of law in reference to gambling or gaming, or operating a bucket-shop or any business dealing in contracts commonly called "futures," to apprehend such person, and bring him before some officer having jurisdiction thereof, and to appear and prosecute such offender.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 11(4); 1857, ch. 64, art. 149; 1871, § 2612; 1880, § 2858; 1892, § 1383; 1906, 1455; Hemingway's 1917, § 1212; 1930, § 1235; 1942, § 2478; Laws, 1950, ch. 344.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER LAW.

6. In general.

I. UNDER CURRENT LAW.

1.-5. [Reserved for future use.]

II. UNDER FORMER LAW.

6. In general.

Gambling statute, in so far as it authorizes arrest without warrant for misdemeanor not committed in presence of officer making arrest, held to violate constitution. Polk v. State, 167 Miss. 506, 142 So. 480, 1932 Miss. LEXIS 197 (Miss. 1932).

§ 99-3-27. Tramps; arrest by any person; proceedings.

Any person may arrest a tramp and take him before a justice of the peace, who shall at once take the affidavit of such person charging the offense, and shall then try the accused for being a tramp, and deal with him accordingly, if found guilty.

HISTORY: Codes, 1880, § 2962; 1892, § 1311; 1906, § 1385; Hemingway's 1917, § 1128; 1930, § 1158; 1942, § 2395.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Another section derived from same 1942 code section, see § 97-35-31.

§ 99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.

(1)(a)(i) Except as provided in subsection (2) of this section, before an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent opportunity program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent opportunity program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.

(ii) The authority receiving any such charge or complaint against a teacher, jail officer, counselor at an adolescent offender program or law enforcement officer shall immediately present same to the county prosecuting attorney having jurisdiction who shall immediately present the charge or complaint to a circuit judge in the judicial district where the action arose for disposition pursuant to this section.

(b) For any person not covered under paragraph (a) of this subsection, before an arrest warrant based on the criminal complaint of a person who is not a law enforcement officer acting in the officer's official capacity may be issued against the person for an alleged criminal act, whether misdemeanor or felony, the appropriate judge must make a determination, with or without a hearing, as to whether the affidavit clearly identifies probable cause to believe that the offense alleged has been committed, at the discretion of the court. If the judge elects to hold a probable cause hearing, parties testifying shall do so under oath and the accused shall have the right to enter an appearance, be represented by legal counsel at his own expense, to hear the accusations and evidence against him, and may present evidence or testify in his own behalf.

(2) Nothing in this section shall prohibit the issuance of an arrest warrant by a circuit court judge upon presentation of probable cause, without the holding of a probable cause hearing, if adequate evidence is presented to satisfy the court that there is a significant risk that the accused will flee the court's jurisdiction or that the accused poses a threat to the safety or well-being of the public.

(3) Nothing in this section shall prohibit a law enforcement officer from arresting any person under circumstances in which the law enforcement officer would not be required to seek a warrant from a court.

HISTORY: Laws, 2001, ch. 566, § 3; Laws, 2002, ch. 488, § 1; Laws, 2004, ch. 486, § 1; Laws, 2015, ch. 330, § 2, eff from and after July 1, 2015; Laws, 2020, ch. 334, § 1, eff from and after July 1, 2020.

Amendment Notes — The 2020 amendment, in (1), redesignated former (1)(a) and (b) as (1)(a)(i) and (ii), and added (b); added (3); and made a minor stylistic change.

Cross References — Teachers, in general, see §§ 37-9-1 et seq.

JUDICIAL DECISIONS

1. Application.

Defendant was not entitled to a probable cause hearing under this section because the victim was not defendant's student, defendant happened to work at the same school the victim attended, defendant never taught or supervised the victim, and all of the alleged criminal activities occurred off campus outside of school hours. Jackson v. State, 299 So. 3d 823, 2020 Miss. App. LEXIS 5 (Miss. Ct. App.), cert. denied, 300 So. 3d 43, 2020 Miss. LEXIS 303 (Miss. 2020).

Miss. Code Ann. § 99-3-28 does not apply once an indictment has been returned by a grand jury. State v. Delaney, 52 So. 3d 348, 2011 Miss. LEXIS 26 (Miss. 2011).

OPINIONS OF THE ATTORNEY GENERAL

A justice court does not have jurisdiction to issue an arrest warrant against a teacher or law enforcement officer for actions that occur while they are performing their official duties; such complaints should be referred to the circuit court for resolution, however, this does not preclude a justice court from making a probable cause determination and issuing an arrest warrant for a teacher or law enforcement officer for actions that occur when they are not on official duty. Branch, Oct. 4, 2002, A.G. Op. #02-0578.

This section requires a probable cause determination to be made by a circuit judge prior to a municipal or justice court commencing a criminal trial against a teacher or law enforcement officer for an offense committed within the performance of official duties. Tucker, Aug. 29, 2003, A.G. Op. 03-0440.

A law enforcement officer (or teacher) may be indicted by a grand jury for offenses committed in the performance of his duties, without a circuit judge conducting a probable cause hearing as required by this section. Furthermore, there would be no need to conduct a probable cause hearing after an indictment has been returned by a grand jury but prior to the arrest of the law enforcement officer (or teacher) on the indictment. Mellen, Mar. 3, 2004, A.G. Op. 04-0095.

This section does not apply to a situation where a law enforcement officer observes a crime being committed in his presence. The officer may arrest the offender without a warrant and take him before a circuit judge for a probable cause determination. Bullock, June 21, 2004, A.G. Op. 04-0260.

§ 99-3-29. Perjury; court may commit wilful perjurer to prison immediately.

Whenever it shall appear to any court that a witness or party who has been sworn or examined in any case, matter, or proceeding pending before the court, has testified in such manner as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter, the court may immediately commit such party or witness, by an order of process for that purpose, to prison, to take bond or recognizance with sureties for his appearing and answering to an indictment for perjury.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(5); 1857, ch. 64, art. 207; 1871, § 2663; 1880, § 2924; 1892, § 1384; 1906, § 1456; Hemingway's 1917, § 1213; 1930, § 1236; 1942, § 2479.

Cross References — Perjury generally, see §§ 97-9-59 et seq.
Indictment for perjury, see § 99-7-39.

JUDICIAL DECISIONS

1. In general.

In prosecution for contempt of court for violation of temporary injunction issued to have the premises of the defendant declared a common nuisance, where the chancellor bound the accused over to await action of the grand jury on the charge of perjury as a result of information obtained aliunde the record, the chancellor did not deal unfairly with the accused as regards his guilt and sentence. McBride v. State, 221 Miss. 508, 73 So. 2d 154, 1954 Miss. LEXIS 557 (Miss. 1954).

The action of a trial court in committing the defendant to the custody of the sheriff to await the action of the grand jury on the charge of perjury was no such prejudice or bias as to disqualify him from performing his duties as a trial judge in the case after an indictment has been returned by the grand jury. Clanton v. State, 210 Miss. 700, 50 So. 2d 567, 1951 Miss. LEXIS 308 (Miss. 1951).

A witness should not be adjudged in contempt and punished for false swearing except in pursuance of the procedure prescribed by this statute unless it could be safely said that the trial judge has found the witness guilty as a result of his own personal or judicial knowledge of the facts in regard to which the testimony has been given. McInnis v. State, 202 Miss. 715, 32 So. 2d 444, 1947 Miss. LEXIS 334 (Miss. 1947).

The arrest provided for by this section [Code 1942, § 2479] must not be made in the presence and hearing of the jury; to do so operates a reversal. Brandon v. State, 75 Miss. 904, 23 So. 517, 1898 Miss. LEXIS 30 (Miss. 1898).

If upon the trial of a misdemeanor the court erroneously causes the arrest of a witness for perjury in the presence of the jury it is not reversible error if before the end of the trial the court recognizes the right of defendant to begin anew before another jury, and defendant elects to waive such right and proceed, his waiver being beyond recall. Chase v. State, 75 Miss. 502, 22 So. 828, 1897 Miss. LEXIS 118 (Miss. 1897).

§ 99-3-31. Perjury; witnesses to be bound over for grand jury and trial.

When a person has been committed to custody under Section 99-3-29 the court shall thereupon bind over the witnesses necessary to establish the perjury to appear at the proper court to testify before the grand jury and on the trial, in case an indictment be found for such perjury.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(6); 1857, ch. 64, art. 208; 1871, § 2664; 1880, § 2925; 1892, § 1385; 1906, § 1457; Hemingway's 1917, § 1214; 1930, § 1237; 1942, § 2480.

Cross References — Perjury generally, see §§ 97-9-59 et seq.
Indictment for perjury, see § 99-7-39.

§ 99-3-33. Perjury; court may detain documents.

If, on the hearing of any cause, matter or proceeding in which perjury shall be suspected to have been committed, any paper or document produced by either party be deemed necessary to be used in the prosecution for perjury, the court may by order detain the paper or document from the party producing it, and direct that it be delivered to the district attorney.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(7); 1857, ch. 64, art. 209; 1871, § 2665; 1880, § 2926; 1892, § 1386; 1906, § 1458; Hemingway's 1917, § 1215; 1930, § 1238; 1942, § 2481.

Cross References — Perjury generally, see §§ 97-9-59 et seq.
Indictment for perjury, see § 99-7-39.

§ 99-3-35. Reward for arrest and delivery of fleeing killer.

A person who shall arrest anyone who kills another and is fleeing, or attempting to flee, before arrest, and shall deliver him up for trial, shall be entitled to the sum of one hundred dollars out of the treasury of the county in which the homicide occurred, upon the allowance of the circuit court and the board of supervisors of the county in the manner provided by law.

HISTORY: Codes, 1857, ch. 64, art. 286; 1871, § 2786; 1880, § 3035; 1892, § 1387; 1906, § 1459; Hemingway's 1917, § 1216; 1930, § 1239; 1942, § 2482; Laws, 1910, ch. 187.

Cross References — Officers entitled to statutory reward for arrest of fleeing homicides, see § 99-3-37.
Reward for information leading to apprehension of any person subsequently convicted of any crime or misdemeanor committed in the state, see § 99-3-39.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Eligibility of peace officers.
3. Flight.
4. Claim for reward; who liable.

1. In general.

This section [Code 1942, § 2482] is not designed to reward mere informers. Ex parte Davis, 208 Miss. 430, 44 So. 2d 526, 1950 Miss. LEXIS 259 (Miss. 1950).

Reward cannot be allowed under this section [Code 1942, § 2482] to claimant who makes no arrest of fleeing homicide but merely advises him against flight, leaving criminal free to come and go as he pleases up to point when officer takes him into custody. Ex parte Davis, 208 Miss. 430, 44 So. 2d 526, 1950 Miss. LEXIS 259 (Miss. 1950).

This section [Code 1942, § 2482] should be liberally construed in favor of the person making the arrest. Warren County v. Lanier, 87 Miss. 606, 40 So. 429, 1905 Miss. LEXIS 211 (Miss. 1905), overruled, Ex parte Webb, 96 Miss. 8, 49 So. 567, 1909 Miss. LEXIS 6 (Miss. 1909); Ex parte Webb, 96 Miss. 8, 49 So. 567, 1909 Miss. LEXIS 6 (Miss. 1909); Ex parte Austin, 129 Miss. 869, 93 So. 369, 1922 Miss. LEXIS 102 (Miss. 1922); Ex parte Fairley, 162 Miss. 456, 139 So. 399, 1932 Miss. LEXIS 130 (Miss. 1932).

One is entitled to the reward under this section [Code 1942, § 2482] where he arrests a fugitive who was before arrested on a charge of assault and battery with intent to kill and is by the magistrate discharged, the wound proving mortal after such discharge and the second arrest being for murder. Newton County v. Doolittle, 72 Miss. 929, 18 So. 451, 1895 Miss. LEXIS 56 (Miss. 1895).

One is entitled to the reward under this section [Code 1942, § 2482] where a mortal wound is inflicted though the wounded person be not dead when the arrest is made. Martin v. Copiah County, 71 Miss. 407, 15 So. 73, 1893 Miss. LEXIS 205 (Miss. 1893).

If a homicide have never been in the custody of the officers of the law even though he were previously arrested by a private party from whom he escaped before being surrendered to the officers the party arresting and delivering him is entitled to the reward. Wilson v. Wallace, 64 Miss. 13, 8 So. 128, 1886 Miss. LEXIS 4 (Miss. 1886).

One who rearrests an escaped homicide is not entitled to the reward. Board of Supervisors v. Candler, 62 Miss. 193, 1884 Miss. LEXIS 50 (Miss. 1884).

2. Eligibility of peace officers.

State highway patrolman, not being peace officer, has same authority that private citizen would have to make arrest of fleeing homicide under same circumstances, and no more, and would be entitled to receive statutory reward the same as if he had been private citizen and had made arrest and delivery of prisoner under circumstances provided for by this section [Code 1942, § 2482]. Smith v. Rankin County, 208 Miss. 792, 45 So. 2d 592, 1950 Miss. LEXIS 300 (Miss. 1950).

On consideration of public policy, police officer cannot lawfully claim reward for performance of service which it was his duty to discharge. Petition of Aultman, 205 Miss. 397, 38 So. 2d 901, 1949 Miss. LEXIS 437 (Miss. 1949).

Member of police force who arrests fleeing homicide in city and county in which officer resides, the city paying him fixed salary for his services as officer, is ineligible to receive reward provided for under this section [Code 1942, § 2482] for arrest of fleeing homicide, homicide and arrest occurring within corporate limits of city. Petition of Aultman, 205 Miss. 397, 38 So. 2d 901, 1949 Miss. LEXIS 437 (Miss. 1949).

A sheriff of another state who arrests in his own state a person who killed another in this state and is fleeing from arrest and merely notifies by telegraph the sheriff of the county where the homicide was committed is not entitled to the reward provided by this section [Code 1942, § 2482] because he did not deliver up the prisoner for trial and was under legal duty to make the arrest. Gould v. Chickasaw County, 85 Miss. 123, 37 So. 710, 1904 Miss. LEXIS 144 (Miss. 1904).

A sheriff of Texas is not entitled for arresting in Texas a person thereafter committing a homicide in Mississippi to the reward provided by the section [Code 1942, § 2482]. Rucker v. State, 18 So. 121 (Miss. 1895).

Officers under obligations as such to make the arrest were not entitled to the reward provided for in this section [Code 1942, § 2482]. Ex parte Gore, 57 Miss. 251, 1879 Miss. LEXIS 59 (Miss. 1879).

3. Flight.

Claim of fleeing homicide that flight was for another purpose than to avoid arrest would not defeat claim for reward under statute. Ex parte Fairley, 162 Miss. 456, 139 So. 399, 1932 Miss. LEXIS 130 (Miss. 1932).

Where there is killing followed by flight of the homicide, conclusive presumption under statute respecting reward is that flight was for purpose of avoiding arrest. Ex parte Fairley, 162 Miss. 456, 139 So. 399, 1932 Miss. LEXIS 130 (Miss. 1932).

A person who hides in a barn is fleeing or attempting to flee. Ex parte Austin, 129 Miss. 869, 93 So. 369, 1922 Miss. LEXIS 102 (Miss. 1922).

The homicide must be fleeing or attempting to flee in order to entitle the party arresting him to a reward. Wilkinson County v. Jones, 52 So. 453 (Miss. 1910); Board of Sup'rs v. Wright, 111 Miss. 790, 72 So. 226, 1916 Miss. LEXIS 395 (Miss. 1916).

The reward cannot be claimed for arresting one who after killing a person remained at home two days, not concealing himself and then left for another state remaining at one place till arrested, it being generally known where he was. Rucker v. State, 18 So. 121 (Miss. 1895).

Where one who has killed another is arrested in open day on a highway while going into the town of his residence, being near the business part of it, declaring at the time that he is on the way to surrender, the reward should not be allowed to the person making the arrest. Board of Sup'rs v. Cottrel, 70 Miss. 117, 12 So. 156, 1892 Miss. LEXIS 98 (Miss. 1892).

4. Claim for reward; who liable.

The action of the circuit court reversing the action of the board of supervisors in disallowing a claim for reward is an allowance of the claim. Ex parte Webb, 96 Miss. 8, 49 So. 567, 1909 Miss. LEXIS 6 (Miss. 1909).

The county does not have to be made a party defendant to a proceeding for reward under this section [Code 1942, § 2482]. Ex parte Webb, 96 Miss. 8, 49 So. 567, 1909 Miss. LEXIS 6 (Miss. 1909).

In case of injury in one county resulting in death in another, the reward is payable by the county in which the cause of death was inflicted and not by the county where the death occurred. Board of Supervisors v. Wells, 67 Miss. 151, 6 So. 614, 1889 Miss. LEXIS 4 (Miss. 1889).

RESEARCH REFERENCES

ALR.

Knowledge of reward as condition of right thereto. 86 A.L.R.3d 1142.

Am. Jur.

67 Am. Jur. 2d, Rewards §§ 1 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 1-5, (complaint, petition, or declaration to recover reward).

35 Am. Jur. Proof of Facts 2d 691, Right to Reward for Information Leading to Arrest and Conviction of Criminal Offender.

§ 99-3-37. Reward for arrest and delivery of fleeing killer; sheriff and other officers may receive.

The sheriff or other officers who shall arrest anyone who kills another and is fleeing, or attempting to flee, shall be entitled to the reward provided for in Section 99-3-35 the same as other persons, provided the killing is not done in the county in which the officer making the arrest resides. But the court adjudging such award to be due may, in its discretion, order the reward to be divided equally between the officer making the arrest and any person or persons, giving him information leading to such arrest.

HISTORY: Codes, Hemingway's 1917, § 1217; 1930, § 1240; 1942, § 2483; Laws, 1910, ch. 187.

Cross References — Reward for arrest and delivery of fleeing killer, see § 99-3-35.
Reward for information leading to apprehension of any person subsequently convicted of any crime or misdemeanor committed in the state, see § 99-3-39.

RESEARCH REFERENCES

Am. Jur.

67 Am. Jur. 2d, Rewards §§ 1 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 1-5, (complaint, petition, or declaration to recover reward).

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 7-12, (instructions to jury pertaining to rewards).

35 Am. Jur. Proof of Facts 2d 691, Right to Reward for Information Leading to Arrest and Conviction of Criminal Offender.

§ 99-3-39. Rewards for information may be offered by counties and municipalities.

(1) Boards of supervisors of the various counties of this state and the governing authorities of the municipalities, may either separately or in conjunction with each other, within their discretion, offer monetary rewards, the amount of which shall be fixed by the aforesaid governing authorities, within their discretion, for information leading to the apprehension of any person subsequently convicted of any crime or misdemeanor committed within this state; information regarding the whereabouts of missing persons; the ascertaining or divulging of any information necessary or helpful for the governing or the tranquility of any municipality or county of this state or for any like purpose, provided said reward shall not exceed the sum of Fifteen Thousand Dollars ($15,000.00) and provided further, that said reward shall not be paid to any law enforcement officer or any employee of the governing authority offering such reward or any member of the immediate family of either.

(2) The aforesaid rewards may be paid from the general fund of the respective counties or municipalities.

HISTORY: Codes, 1942, § 2482.5; Laws, 1966, ch. 313, §§ 1, 2; Laws, 1970, ch. 345, §§ 1, 2; Laws, 2007, ch. 513, § 1, eff from and after July 1, 2007.

Cross References — Reward for arrest and delivery of fleeing killer, see § 99-3-35.
Officers entitled to statutory reward for arrest of fleeing homicides, see § 99-3-37.

OPINIONS OF THE ATTORNEY GENERAL

Various municipal governing authorities may encourage the same type of citizen and community crime solving assistance as the private non-profit Crimestoppers program by directly offering monetary rewards, in their discretion, for information leading to the arrest and conviction of those responsible for committing crimes in their areas. Gunn, January 23, 1998, A.G. Op. #98-0020.

A municipality may not use general funds to make donations to a nonprofit corporation such as Crimestoppers, a not for profit Mississippi corporation established to encourage citizens to provide tips and information which may assist in solving crimes; however, a municipality may encourage the same type of citizen and community crime solving assistance by directly offering monetary rewards in their discretion for information leading to the arrest and conviction of those persons responsible for committing crimes. Prichard, Sept. 7, 2001, A.G. Op. #01-0512.

RESEARCH REFERENCES

ALR.

Knowledge of reward as condition of right thereto. 86 A.L.R.3d 1142.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution-modern cases. 80 A.L.R.4th 547.

Am. Jur.

67 Am. Jur. 2d, Rewards §§ 1 et seq.

16 Am. Jur. Legal Forms 2d, Rewards, §§ 225:14 et seq., (offers of reward).

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 1-5, (complaint, petition, or declaration to recover reward).

21 Am. Jur. Pl & Pr Forms (Rev), Rewards, Forms 7-12, (instructions to jury pertaining to rewards).

35 Am. Jur. Proof of Facts 2d 691, Right to Reward for Information Leading to Arrest and Conviction of Criminal Offender.

§ 99-3-41. HIV and AIDS testing of persons arrested for the commission of sex crimes against minors.

(1) Every person who is arrested for the commission of any sex crime against a minor as provided in Section 97-5-51, the Mississippi Child Protection Act, shall be tested for the human immunodeficiency virus (HIV) and the acquired immune deficiency syndrome (AIDS). Such test shall be administered upon arrest but, no later than twenty-four (24) hours after arrest. The test shall be performed by any qualified medical personnel in conjunction with the arresting authority. The arresting authority shall report all test results to the State Department of Health and the Children's Safe Center, no later than twenty-four (24) hours after the test results are available. Each victim of the alleged offense, or the parent, guardian, or custodian of each minor victim, and the accused shall be notified of the test results, no later than twenty-four (24) hours after the test results are available. The State Department of Health shall provide counseling and the referral for the appropriate treatment for each victim when the accused tested positive for HIV or AIDS. For the purposes of this section, the term "minor" means the same as defined in Section 97-5-51. The HIV and AIDS tests collected under the authority of this section shall not be used for any other purpose that is not authorized by this section.

(2) Any qualified medical personnel and/or arresting authority who is authorized to perform the test required by subsection (1) of this section shall only keep the results of HIV and/or AIDS tests, but shall destroy any biological sample taken from a person for purposes of performing such tests.

HISTORY: Laws, 2015, ch. 307, § 1; Laws, 2016, ch. 371, § 1, eff from and after passage (approved Apr. 6, 2016).

§ 99-3-43. Criminal history background check to be conducted by officers stopping persons to effectuate arrest.

(1) When a state, county or local law enforcement officer stops a person with the intent to effectuate an arrest of the person, if the officer has the capability of doing so, the officer shall, at the time of the stop or as soon as possible thereafter, conduct a criminal history background check on the person being arrested using the National Crime Information Center (NCIC) database. If the stop results in the officer arresting the person, the officer shall make a notation of the person's criminal history at the time of arrest. If the criminal history cannot be obtained at the time of the arrest, it must be accessed and noted at the person's booking. The Federal Bureau of Investigation arrest numbers or system identification numbers of prior arrests or convictions shall be noted and become a part of the person's law enforcement record until the disposal of the matter giving rise to the grounds for arrest. A copy of the person's NCIC driver's license query shall become a part of the person's law enforcement record until the disposal of the matter giving rise to the grounds for arrest.

(2) Subsection (1) of this section shall apply without regard to whether the person:

(a) Is arrested for a misdemeanor or felony offense;
(b) Is issued a citation in lieu of continued custody; or
(c) Is arrested without a warrant.

HISTORY: Laws, 2016, ch. 503, § 9, eff from and after Oct. 1, 2016.

§ 99-3-45. Requisite notice to be given to persons under the age of twenty-one released following arrest under certain circumstances.

A person under the age of twenty-one (21) who is released under either Section 99-3-17 or 99-3-18 following arrest must be given notice:

(a) That the person is allowed to call a parent, guardian or custodian in addition to any other opportunity to call that has been afforded to such person; and

(b) That Intervention Court and other pretrial diversion programs may be available for many offenses.

HISTORY: Laws, 2017, ch. 416, § 12, eff from and after passage (approved Apr. 11, 2017); Laws, 2019, ch. 466, § 27, eff from and after July 1, 2019.

Editor's Note — Laws of 2019, ch. 466, § 1 provides:
"SECTION 1. This act shall be known and may be cited as the 'Criminal Justice Reform Act.' "

Amendment Notes — The 2019 amendment substituted "Intervention Court" for "drug court" in (b).

CHAPTER 5.

BAIL

Sec.
99-5-1. Form of bail; professional and soliciting bail agents to provide certain additional information; penalties.
99-5-3. Form of bail; taken in open court by entry on minutes.
99-5-5. Bonds to be made payable to state; effect; expiration and renewal.
99-5-7. Fidelity or surety insurance company may give bail.
99-5-9. Cash bail bond.
99-5-11. All conservators of the peace may take recognizance or bond; certificate of default; alias warrant; when protection order registry must be checked; when bond not required.
99-5-13. Court may make adjustments to excessive or insufficient bail.
99-5-15. Duty of officer to release defendant from custody; approval of sureties.
99-5-17. Sheriff to return bail-bond to clerk.
99-5-19. Person who takes insufficient bail-bond, etc., to stand special bail.
99-5-21. Bond good though it does not describe offense.
99-5-23. Bonds, recognizances, etc., to be valid and binding whether or not properly taken or recited in return of officer.
99-5-25. Forfeiture of bond; scire facias.
99-5-27. Bail agent may arrest and surrender principal; return of defendant out on bond.
99-5-29. Surety may cause arrest of principal by officer.
99-5-31. Mittimus in bailable cases to fix the bail.
99-5-33. Accused committed to prison if injured party is dangerously wounded.
99-5-35. When prisoner charged with capital offense entitled to bail.
99-5-37. Domestic violence, aggravated domestic violence, aggravated stalking, knowing violation of bond or knowing violation of domestic abuse protection order; required appearance before judge; considerations; conditions.
99-5-38. Use of global positioning monitoring system as condition of bond for defendant in domestic violence case; definitions; information to be provided victim.
99-5-39. Appearance bond as condition of any court ordered supervision; defendant's failure to appear as grounds for forfeiture of bond.

§ 99-5-1. Form of bail; professional and soliciting bail agents to provide certain additional information; penalties.

Bail may be taken in the following form, viz:

"State of Mississippi,
________________ County.

We ________, principal, and ________ and ________, sureties, agree to pay the State of Mississippi ________ Dollars, unless the said ________ shall appear at the next term of the Circuit Court of ________ County, and there remain from day to day and term to term until discharged by law, to answer a charge of ________.

Signed ________________
____

Approved ________
_______________ "

When the bail is for appearance before any committing court or a judge, the form may be varied to suit the condition.

When a bond is taken from a professional bail agent, the following must be preprinted or stamped clearly and legibly on the bond form: full name of the professional bail agent, Department of Insurance license number, full and correct legal address of the professional bail agent and complete phone number of the professional bail agent. In addition, if the bond is posted by a limited surety professional bail agent, the name of the insurer, the legal address of the insurer on file with the department and phone number of the insurer must be preprinted or stamped, and a true and correct copy of an individual's power of attorney authorizing the agent to post such bond shall be attached.

If the bond is taken from a soliciting bail agent, the full name of the soliciting bail agent and the license number of such agent must be preprinted or stamped clearly and legibly along with all information required for a professional bail agent and a true and correct copy of an individual's power of attorney authorizing such soliciting bail agent to sign the name of the professional bail agent.

Any professional bail agent and/or soliciting bail agents who issue a bail bond that does not contain this required information may have their license suspended up to six (6) months and/or be fined not more than One Thousand Dollars ($1,000.00) for the first offense, may have their license suspended up to one (1) year and/or be fined not more than Five Thousand Dollars ($5,000.00) for the second offense and shall have their license permanently revoked if they commit a third offense.

The court or the clerk of the court shall notify the department when any professional bail agent or soliciting bail agent or insurer issues a bail bond that contains information that misleads a court about the proper delivery by personal service or certified mail of a writ of scire facias, judgment nisi or final judgment.

HISTORY: Codes, 1880, § 3047; 1892, § 1400; 1906, § 1472; Hemingway's 1917, § 1230; 1930, § 1252; 1942, § 2495; Laws, 2007, ch. 390, § 1; Laws, 2014, ch. 479, § 4, eff from and after July 1, 2014.

Cross References — Excessive bail prohibited; revocation or denial of bail, see Miss. Const., Art. 3, § 29.

Applicability of general bail provisions to the Mississippi Code of Military Justice, see § 33-13-623.

Deposit of driver's license in lieu of bail in traffic cases, see § 63-9-25.

Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-25.

Form of bail, see MRCrP 8.

JUDICIAL DECISIONS

1. Variance of bail agreement.

A surety was liable under a bail bond in light of the adjustment of the bail agreement in open court by the agent for the surety where (1) the bail agreement originally secured the defendant's justice court appearance on a charge of grand larceny, (2) the defendant appeared in justice court and his case was bound over for consideration by the grand jury, (3) the agent for the surety then modified the bond to reflect that it was returnable to both justice court and circuit court, and (4) the defendant thereafter failed to appear in circuit court. State v. Brooks, 781 So. 2d 929, 2001 Miss. App. LEXIS 119 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR.

Propriety of applying cash bail to payment of fine. 42 A.L.R.5th 547.

Propriety, after obligors on appearance bond have been exonerated pursuant to Rule 46(f) of the Federal Rules of Criminal Procedure, of applying cash or other security to fine imposed on accused. 58 A.L.R. Fed. 676.

Am. Jur.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Form 1, (general form of undertaking).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 11 et seq., (amount of bail).

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§ 99-5-3. Form of bail; taken in open court by entry on minutes.

Bail taken in open court may be entered on the minutes as follows, to wit:

"The State
No. ________ v.

A. B.

"Came the said A. B. and C. D. and E. F. and agreed to pay the state of Mississippi ________ dollars, unless the said A. B. shall appear at the present term of this court, and remain from day to day, and from term to term until discharged by law, to answer a charge of ________ ."

HISTORY: Codes, 1880, § 3049; 1892, § 1400a; 1906, § 1473; Hemingway's 1917, § 1231; 1930, § 1253; 1942, § 2496.

Cross References — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

Inapplicability of Mississippi Rules of Evidence in proceedings with respect to release on bail, see Miss. R. Evid. 1101.

RESEARCH REFERENCES

Am. Jur.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Form 2, (undertaking to insure appearance at contempt hearing).

§ 99-5-5. Bonds to be made payable to state; effect; expiration and renewal.

All bonds and recognizances taken for the appearance of any party, either as defendant, prosecutor, or witness in any criminal proceeding or matter, shall be made payable to the state, and shall have the effect to bind the accused and his sureties on the bond or recognizance until the principal shall be discharged by due course of law, and shall be in full force, from term to term, for a period of three (3) years, except that a bond returnable to the Supreme Court shall be in full force for a period of five (5) years. If it is necessary to renew a bond, it shall be renewed without additional premium. At the end of the applicable period, a bond or recognizance that is not renewed shall expire and shall be uncollectible unless the collection process was started on or before the expiration date of such bond or recognizance. Any bond or recognizance taken prior to July 1, 1996, shall expire on July 1, 1999. If a defendant is charged with multiple counts in one (1) warrant only one (1) bond shall be taken.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(57); 1857, ch. 64, art. 291; 1871, § 2791; 1880, § 3040; 1892, § 1393; 1906, § 1465; Hemingway's 1917, § 1223; 1930, § 1245; 1942, § 2488; Laws, 1996, ch. 450, § 1; Laws, 1997, ch. 346, § 1, eff from and after July 1, 1997.

Cross References — Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

JUDICIAL DECISIONS

1. In general.

A provision of a state bail statute whereby an accused may obtain his pretrial release by depositing with the court clerk 10 percent of the amount of bail, but upon performance of the conditions of the bail bond, the clerk returns only 90 percent of a deposit, retaining as bail bond costs 10 percent or one percent of the amount of bail, where other statutory provisions authorize release on personal recognizance, or on deposit of the full amount of bail or security, no retention of administrative charge being imposed in such situations, is not violative of equal protection as being imposed on the poor and not on the affluent, since it will not be presumed that the provision for release on personal recognizance is not utilized by state judges and made available for the poor, and it is not clear that the provision for deposit of the full amount of bail, with no retention charge, is for the affluent, who may find the 10 percent deposit provision just as attractive. Schilb v. Kuebel, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502, 1971 U.S. LEXIS 157 (U.S. 1971).

Bastardy proceeding being in nature of criminal proceeding as respects defendant's arrest and binding over to appear before court, his appearance bond required him to appear at next term of court and there remain from day to day and term to term until discharged by law. Boggan v. Davis, 171 Miss. 307, 157 So. 904, 1934 Miss. LEXIS 269 (Miss. 1934).

The obligation of the sureties is not affected by the subsequent arrest of their principal upon another charge, there being no actual custody to prevent his appearance as required by the bond. Tedford v. State, 67 Miss. 363, 7 So. 352, 1889 Miss. LEXIS 89 (Miss. 1889).

The presence of the accused for trial does not relieve the sureties nor does his arraignment and trial. Lee v. State, 51 Miss. 665, 1875 Miss. LEXIS 92 (Miss. 1875).

A recognizance or bail bond is not void for a mistake in it in relation to the time of the holding of the term of court in which it is returnable. Curry v. State, 39 Miss. 511, 1860 Miss. LEXIS 82 (Miss. 1860).

OPINIONS OF THE ATTORNEY GENERAL

Only one bond should be taken when a defendant is charged with multiple counts in one warrant; however, if separate warrants are issued for felony and misdemeanor offenses or separate affidavits are filed for each offense, then a separate bond may be taken for the separate offenses. Walters, Sept. 28, 2001, A.G. Op. #01-0619.

RESEARCH REFERENCES

ALR.

Discharge, suspension, or remission of bail by reason of imprisonment of principal for a different offense. 4 A.L.R.2d 440.

Right to apply cash bail to payment of fine. 92 A.L.R.2d 1084.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond. 18 A.L.R.3d 1354.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release. 78 A.L.R.3d 780.

Bail: duration of surety's liability on pretrial bond. 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond. 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 A.L.R.4th 600.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 A.L.R.4th 1192.

§ 99-5-7. Fidelity or surety insurance company may give bail.

Bail may be given to the sheriff or officer holding the defendant in custody, by a fidelity or surety insurance company authorized to act as surety within the State of Mississippi. Any such company may execute the undertaking as surety by the hand of officer or attorney authorized thereto by a resolution of its board of directors, a certified copy of which, under its corporate seal, shall be on file with the clerk of the circuit court and the sheriff of the county, and such authority shall be deemed in full force and effect until revoked in writing by notice to said clerk and sheriff.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 12(2); 1857, ch. 64, art. 288; 1871, § 2788; 1880, § 3038; 1892, § 1391; 1906, § 1463; Hemingway's 1917, § 1221; 1930, § 1243; 1942, § 2486; Laws, 1960, ch. 267.

Cross References — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

Cash bail bond, see § 99-5-9.

Approval of sureties, see § 99-5-15.

JUDICIAL DECISIONS

1. In general.

It is the policy of the bail statutes generally to encourage the granting of bail in proper cases. Wooton v. Bethea, 209 Miss. 374, 47 So. 2d 158, 1950 Miss. LEXIS 401 (Miss. 1950).

RESEARCH REFERENCES

ALR.

Propriety of applying cash bail to payment of fine. 42 A.L.R.5th 547.

§ 99-5-9. Cash bail bond.

(1) In addition to any type of bail allowed by statute, any committing court, in its discretion, may allow any defendant, to whom bail is allowable, to deposit cash as bail bond in lieu of a surety or property bail bond, by depositing such cash sum as the court may direct with the sheriff or officer having custody of defendant, who shall receipt therefor and who shall forthwith deliver the said monies to the county treasurer, who shall receipt therefor in duplicate. The sheriff, or other officer, upon receipt of the county treasurer, shall forthwith deliver one (1) copy of such receipt to the committing court who shall then order the release of such defendant.

(2) The order of the court shall set forth the conditions upon which such cash bond is allowed and shall be determined to be the agreement upon which the bailee has agreed.

(3) The sums received by the county treasurer shall be deposited by him in a special fund to be known as "Cash Bail Fund," and shall be received by him subject to the terms and conditions of the order of the court.

(4) If the committing court authorizes bail by a cash deposit under subsection (1) of this section, but anyone authorized to release a criminal defendant allows the deposit of an amount less than the full amount of the bail ordered by the court, the defendant may post bail by a professional bail agent in an amount equal to one-fourth (¼) of the full amount fixed under subsection (1) or the amount of the actual deposit whichever is greater.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 12(2); 1857, ch. 64, art. 288; 1871, § 2788; 1880, § 3038; 1892, § 1391; 1906, § 1463; Hemingway's 1917, § 1221; 1930, § 1243; 1942, § 2486; Laws, 1960, ch. 267; Laws, 2007, ch. 390, § 2, eff from and after July 1, 2007.

Cross References — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

Fidelity or surety insurance company may give bail, see § 99-5-7.
Court may require additional bail, see § 99-5-13.

JUDICIAL DECISIONS

1. In general.

It is the policy of the bail statutes generally to encourage the granting of bail in proper cases. Wooton v. Bethea, 209 Miss. 374, 47 So. 2d 158, 1950 Miss. LEXIS 401 (Miss. 1950).

OPINIONS OF THE ATTORNEY GENERAL

If cash bond is tendered in proper amount, it must be accepted; officials of county jail where town houses its prisoners may not refuse to accept cash bonds on city prisoners. Bond, Nov. 25, 1992, A.G. Op. #92-0834.

A defendant charged with a non-traffic offense may be allowed by the court to post a cash bond and sign an agreement that would allow the cash bond to be used to pay any fine that might be imposed against the defendant as a result of a trial in absentia should the defendant fail to appear; however, such an agreement would in no way relieve the defendant of the obligation to appear for trial, but would merely offer the court an additional option to collect a fine should the defendant fail to appear. Shirley, May 1, 2000, A.G. Op. #2000-0197.

RESEARCH REFERENCES

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 87 et seq.

CJS.

8 C.J.S., Bail §§ 71, 72.

§ 99-5-11. All conservators of the peace may take recognizance or bond; certificate of default; alias warrant; when protection order registry must be checked; when bond not required.

(1) All justice court judges and all other conservators of the peace are authorized, whenever a person is brought before them charged with any offense not capital for which bail is allowed by law, to take the recognizance or bond of the person, with sufficient sureties, in such penalty as the justice court judge or conservator of the peace may require, for his appearance before the justice court judge or conservator of the peace for an examination of his case at some future day. And if the person thus recognized or thus giving bond fails to appear at the appointed time, it shall be the duty of the justice court judge or conservator of the peace to return the recognizance or bond, with his certificate of default, to the court having jurisdiction of the case, and a recovery may be had therein by scire facias, as in other cases of forfeiture. The justice court judge or other conservator of the peace shall also issue an alias warrant for the defaulter.

(2) In circumstances involving an offense against any of the following: (a) a current or former spouse of the accused or child of that person; (b) a person living as a spouse or who formerly lived as a spouse with the accused or a child of that person; (c) a parent, grandparent, child, grandchild or someone

similarly situated to the accused; (d) a person who has a current or former dating relationship with the accused; or (e) a person with whom the accused has had a biological or legally adopted child, the justice court judge or other conservator of the peace shall check, or cause to be made a check, of the status of the person for whom recognizance or bond is taken before ordering bail in the Mississippi Protection Order Registry authorized under Section 93-21-25, and the existence of a domestic abuse protection order against the accused shall be considered when determining appropriate bail.

(3) After the court considers the provisions of subsection (2) of this section, a misdemeanant may be released on his or her own recognizance unless:

(a) The misdemeanant:

(i) Is on probation or parole;

(ii) Has other unresolved charges pending; or

(iii) Has a history of nonappearance; or

(b) The court finds that:

(i) The release of the misdemeanant would constitute a special danger to any other person or to the community; or

(ii) Release of the misdemeanant on his or her own recognizance is highly unlikely to assure the appearance of the misdemeanant as required.

HISTORY: Codes, 1871, § 2874; 1880, § 3044; 1892, § 1397; 1906, § 1469; Hemingway's 1917, § 1227; 1930, § 1249; 1942, § 2492; Laws, 2012, ch. 514, § 11, eff from and after July 1, 2012; Laws, 2019, ch. 466, § 37, eff from and after July 1, 2019.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in subsection (2) by substituting "Mississippi Protection Order Registry" for "Mississippi Protective Order Registry." The Joint Committee ratified the correction at its August 16, 2012, meeting.

Editor's Note — Laws of 2019, ch. 466, § 1 provides as follows:

"SECTION 1. This act shall be known and may be cited as the 'Criminal Justice Reform Act.' "

Amendment Notes — The 2019 amendment added (3).

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Fee on professional bondsmen, appearance bonds and recognizances, see § 83-39-31.

Mississippi Protection Order Registry, see § 93-21-25.

JUDICIAL DECISIONS

1. In general.

An indigent defendant charged with aggravated assault and unable to make bail was improperly denied release on her own recognizance where the record was devoid of any consideration by the judicial officer of alternative forms of release and where there was no evidence that there was a substantial risk of nonappearance. On remand to consider whether a form of pretrial release other than money bail would adequately assure defendant's presence at trial, the ABA minimum standards relating to pretrial release would serve as a guide to the judicial officer in making the release decision. Lee v. Lawson, 375 So. 2d

1019, 1979 Miss. LEXIS 2465 (Miss. 1979).

This statute apparently applies only to instances where the accused has already been charged with an offense, and not to cases where no charge is then pending and no warrant has been issued. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745, 1947 Miss. LEXIS 378 (Miss. 1947).

OPINIONS OF THE ATTORNEY GENERAL

Justice court judge may order constable to release defendant upon defendant's execution of recognizance bond; when such is done defendant would not be placed in county jail and would not need to pay attendant fees. O'Brien Oct. 13, 1993, A.G. Op. #93-0701.

RESEARCH REFERENCES

ALR.

Pretrial preventive detention by state court. 75 A.L.R.3d 956.

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 6 et seq.

CJS.

8 C.J.S., Bail § 61.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

§ 99-5-13. Court may make adjustments to excessive or insufficient bail.

When it shall appear to the committing court or the court before which any person charged with a criminal offense has given bail to appear is insufficient or excessive in any respect, the court may (i) after a hearing, order the issuance of a revised mittimus reducing the previously set bail; or (ii) order the issuance of process for the arrest of such person, and may, after a hearing, require him to give bail as may be ordered, and, in default thereof, may commit him to jail as in other cases.

HISTORY: Codes, 1880, § 3051; 1892, § 1402; 1906, § 1475; Hemingway's 1917, § 1233; 1930, § 1255; 1942, § 2498; Laws, 2016, ch. 496, § 1, eff from and after July 1, 2016.

RESEARCH REFERENCES

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 92 et seq.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 12, 14, 16, (increase of bail).

CJS.

8 C.J.S., Bail § 70.

§ 99-5-15. Duty of officer to release defendant from custody; approval of sureties.

It is the duty of the sheriff or other officer having custody of such defendant, upon his compliance with the order of the committing court or officer, to release him from custody; and he shall approve the sureties on the bond, except admitted and authorized fidelity and surety insurance companies acting as surety, and for that purpose may examine them on oath, or take their affidavit in writing, and may administer such oath.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 12(2); 1857, ch. 64, art. 288; 1871, § 2788; 1880, § 3038; 1892, § 1391; 1906, § 1463; Hemingway's 1917, § 1221; 1930, § 1243; 1942, § 2486; Laws, 1960, ch. 267.

Cross References — Fidelity or surety insurance company may give bail, see § 99-5-7.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Discretion to accept or reject bonds.

1. In general.

It is the policy of the bail statutes generally to encourage the granting of bail in proper cases. Wooton v. Bethea, 209 Miss. 374, 47 So. 2d 158, 1950 Miss. LEXIS 401 (Miss. 1950).

2. Discretion to accept or reject bonds.

While Miss. Code Ann. § 19-25-67 authorized a sheriff to take bonds, so long as they were accompanied by good and sufficient sureties, it did not require the sheriff to accept every bond offered with sufficient sureties, and the sheriff had limited discretion as to whether to accept or reject a bond tendered for the release of an accused; Miss. Code Ann. § 99-5-19 supported this finding, in that it twice mentioned the person taking and approving a bail bond. Tunica County v. Hampton Co. Nat'l Sur., LLC, 27 So. 3d 1128, 2009 Miss. LEXIS 249 (Miss. 2009).

OPINIONS OF THE ATTORNEY GENERAL

In all personal surety bonds, the sheriff is vested with great discretion to approve or not approve the bond. Thompson, Mar. 11, 1992, A.G. Op. #92-0119.

A sheriff may require a professional bail agent acting as a personal surety agent to furnish a financial statement, list of assets or some other documentation to show that the bail agent is solvent and has the ability to meet the obligation of the bond and, if a bail agent refuses to provide proof of solvency, the sheriff may refuse to approve bonds from that bail agent; however, this requirement does not apply to a limited surety agent representing an authorized fidelity and surety insurance company. Dykes, Feb. 15, 2002, A.G. Op. #02-0044.

In addition to this section, §§ 19-25-67 and 99-33-7.give a sheriff the authority to take or approve bonds. Tolar, Oct. 31, 2003, A.G. Op. 03-0571.

A sheriff may not exclude all personal surety bail bondsmen from writing bonds with the county for persons charged with felonies and accept only bonds submitted by authorized fidelity and surety insurance companies. Grimmett, Apr. 16, 2004, A.G. Op. 04-0155.

A sheriff may require a bondsman to furnish a financial statement, list of assets or some other documentation to show that the bondsman is solvent and has the ability to meet the obligation of the bond. If a bondsman refuses to provide proof of solvency, the sheriff may refuse to approve bonds from that bondsman. Grimmett, Apr. 16, 2004, A.G. Op. 04-0155.

A sheriff cannot act in an arbitrary and capricious fashion when approving or rejecting bail bonds and should be able to articulate the reason why a bond was refused. Grimmett, Apr. 16, 2004, A.G. Op. 04-0155.

A sheriff does not have authority to require insurance of bonding companies doing business with the sheriff's department. The sheriff may refuse to approve the bond of a bondsman whom the sheriff has found to be insolvent, to have insufficient assets or to be in default. Haywood, Oct. 29, 2004, A.G. Op. 04-0547.

RESEARCH REFERENCES

ALR.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 A.L.R.4th 27.

§ 99-5-17. Sheriff to return bail-bond to clerk.

It is the duty of the sheriff taking a bail-bond to return the same to the clerk of the circuit court of the county in which the offense is alleged to have been committed on or before the first day of the next term thereof.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 12(3); 1857, ch. 64, art. 289; 1871, § 2789; 1880, § 3039; 1892, § 1392; 1906, § 1464; Hemingway's 1917, § 1222; 1930, § 1244; 1942, § 2487.

§ 99-5-19. Person who takes insufficient bail-bond, etc., to stand special bail.

If any person, except a properly authorized judge, authorized to release a criminal defendant neglects to take a bail bond, or if the bail bond from any cause is insufficient at the time he took and approved the same, on exceptions taken and filed before the close of the next term, after the same should have been returned, and upon reasonable notice thereof to the person, he shall stand as special bail, and judgment shall be rendered against him as such, except when bond is tendered by a fidelity or insurance company or professional bail agent or its bail agent authorized by Mississippi state license to act as bail surety. The person taking and approving a bail bond from a fidelity or insurance company or professional bail agent or its bail agent with a valid Mississippi state license shall bear no financial liability on the bail bond in the event of a bail bond forfeiture or default.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 12(3); 1857, ch. 64, art. 289; 1871, § 2789; 1880, § 3039; 1892, § 1392; 1906, § 1464; Hemingway's 1917, § 1222; 1930, § 1244; 1942, § 2487; Laws, 1997, ch. 335, § 1; Laws, 2004, ch. 363, § 2, eff from and after July 1, 2004.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Discretion to accept or reject bonds.

1. In general.

This section, which provides that determination as to need for bail bond or propriety of personal recognizance release is vested in discretion of judicial officer, and that once bail has been set duty to review adequacy of bondsmen is left to sheriff, who must satisfy himself as to reliability of surety or stand personally liable for amount of bond should surety prove insufficient, does not violate Eighth Amendment. Williams v. Farrior, 626 F. Supp. 983, 1986 U.S. Dist. LEXIS 30466 (S.D. Miss. 1986).

2. Discretion to accept or reject bonds.

While Miss. Code Ann. § 19-25-67 authorized a sheriff to take bonds, so long as they were accompanied by good and sufficient sureties, it did not require the sheriff to accept every bond offered with sufficient sureties, and the sheriff had limited discretion as to whether to accept or reject a bond tendered for the release of an accused; Miss. Code Ann. § 99-5-19 supported this finding, in that it twice mentioned the person taking and approving a bail bond. Tunica County v. Hampton Co. Nat'l Sur., LLC, 27 So. 3d 1128, 2009 Miss. LEXIS 249 (Miss. 2009).

OPINIONS OF THE ATTORNEY GENERAL

Sheriff may refuse to approve a bond if surety is not sufficient; type of offense, whether felony or misdemeanor, should make no difference in approving bond. Brewer, Oct. 7, 1992, A.G. Op. #92-0532.

Once justice court judge issues mittimus to sheriff setting forth amount of bail and number of sureties required, sheriff can only release defendant when bond or other conditions set by judge have been fully satisfied and failure of sheriff to comply with mittimus could result in sheriff standing as special bail and having judgment rendered against him. Vess, March 18, 1994, A.G. Op. #94-0124.

As a result of the 1997 and 2004 amendments to this section the sheriff has no personal liability if the bond is taken and approved from one of the named entities. A professional bail agent is either "a licensed personal surety agent" acting without an insurer or is 'a limited surety agent representing an insurer." The use of either in taking and approving a bond would negate liability on the part of the sheriff. McWilliams, Nov. 15, 2004, A.G. Op. 04-0552.

§ 99-5-21. Bond good though it does not describe offense.

All bonds and recognizances taken in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer to such offense as he may have actually committed, and shall be valid for that purpose until he be discharged by the court.

HISTORY: Codes, 1857, ch. 64, art. 368; 1871, § 2873; 1880, § 3042; 1892, § 1395; 1906, § 1467; Hemingway's 1917, § 1225; 1930, § 1247; 1942, § 2490.

JUDICIAL DECISIONS

1. In general.

A bond for the appearance for the defendant to answer the charge of robbery is good for the appearance of the defendant on a charge of grand larceny where the indictment grew out of the offense intended to be described in the bond. Smith v. State, 86 Miss. 315, 38 So. 319, 1905 Miss. LEXIS 31 (Miss. 1905); Allen v. State, 110 Miss. 384, 70 So. 362, 1915 Miss. LEXIS 38 (Miss. 1915).

A mistake does not render a bond invalid, a scire facias can be amended if necessary to show the facts. Curry v. State, 39 Miss. 511, 1860 Miss. LEXIS 82 (Miss. 1860).

RESEARCH REFERENCES

Am. Jur.
8A Am. Jur. 2d, Bail and Recognizance § 79.

§ 99-5-23. Bonds, recognizances, etc., to be valid and binding whether or not properly taken or recited in return of officer.

All bonds, recognizances, or acknowledgments of indebtedness, conditioned for the appearance of any party before any court or officer, in any state case or criminal proceeding, which shall have the effect to free such party from jail or legal custody of any sort, shall be valid and bind the party and sureties, according to the condition of such bond, recognizance, or acknowledgment, whether it was taken by the proper officer or under circumstances authorized by law or not, or whether the officer's return identify it or not.

It shall not be an objection to any bail-bond or recognizance that it is in the form of an acknowledgment before a court or officer and is without the signature of any person, or is without the indorsement of approval by any officer; but all persons who, by their acknowledgment before any officer of liability to pay a sum of money to the state if some person shall not appear before some court or officer in a criminal prosecution, procure the discharge from custody of such person, shall be bound accordingly upon the recognizance. An obligation signed by a person to obtain the discharge from custody of another shall not be invalid, if it have that effect, because it does not have indorsed on it the approval of any officer, or because the taking thereof be not recited in the return of the officer.

HISTORY: Codes, 1880, §§ 3041, 3050; 1892, §§ 1394, 1401; 1906, §§ 1466, 1474; Hemingway's 1917, §§ 1224, 1232; 1930, §§ 1246, 1254; 1942, §§ 2489, 2497.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2489] is based on the assumption that the principal in the bail bond is lawfully in custody and has no application where there is an absolute want of power in the officer who arrested the principal in the bail bond to so do and who exacted the bond before he would release the principal therein from custody, and, accordingly, the arrest of one on a warrant issued by a circuit clerk was illegal and the bond under which he was set at liberty is void. Martin v. State, 190 Miss. 32, 199 So. 98, 1940 Miss. LEXIS 188 (Miss. 1940).

This section [Code 1942, § 2489] makes valid a bond erroneously accepted by the arresting officer after serving a warrant issued by a justice of the peace in a bastardy case in so far as an action against the sureties on the bond is concerned, since the effect of the bond and the execution of the bond availed to set the accused free from the legal custody of the arresting officer and the party so procuring is released from legal custody of any sort so that the sureties on his bond cannot thereafter deny the validity thereof because the sheriff was required to keep him in custody and deliver his person into the court of the justice of the peace. Boykin v. West, 183 Miss. 567, 184 So. 624, 1938 Miss. LEXIS 270 (Miss. 1938).

If a bond served to release the principal on the charge the sureties are bound by the bond although the offense may be erroneously described. Allen v. State, 110 Miss. 384, 70 So. 362, 1915 Miss. LEXIS 38 (Miss. 1915).

Judgment nisi should not be taken against the sureties on a bond for the accused's failure to appear and answer an entirely different charge. McCaleb v. State, 96 Miss. 144, 50 So. 555, 1909 Miss. LEXIS 29 (Miss. 1909).

Where a justice of the peace bound a defendant over to appear before the circuit court to await the action of the grand jury on the charge of having committed a misdemeanor, the bond is void notwithstanding this section [Code 1942, § 2489] since there was not power in the justice of the peace to take such bond. Smith v. State, 86 Miss. 315, 38 So. 319, 1905 Miss. LEXIS 31 (Miss. 1905).

OPINIONS OF THE ATTORNEY GENERAL

A Mississippi court may issue a "hold order" to the sheriff of another Mississippi county, and, in such cases, the bail will be entitled to a refund. Perry, May 26, 2000, A.G. Op. #2000-0248.

RESEARCH REFERENCES

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 79 et seq.

CJS.

8 C.J.S., Bail §§ 73 et seq.

§ 99-5-25. Forfeiture of bond; scire facias.

(1)(a) The purpose of bail is to guarantee appearance and a bail bond shall not be forfeited for any other reason.

(b) If a defendant in any criminal case, proceeding or matter fails to appear for any proceeding as ordered by the court, then the court shall order the bail forfeited and a judgment nisi and a bench warrant issued at the time of nonappearance. The clerk of the court shall notify the surety of the forfeiture by writ of scire facias, with a copy of the judgment nisi and bench warrant attached thereto, within ten (10) working days of such order of judgment nisi either by personal service or by certified mail. Failure of the clerk to provide the required notice within ten (10) working days shall constitute prima facie evidence that the order should be set aside. Any felony warrant issued by a court for nonappearance shall be put on the National Crime Information Center (NCIC) until the defendant is returned to custody.

(c) The judgment nisi shall be returnable for ninety (90) days from the date of issuance. If during such period the defendant appears before the court, or is arrested and surrendered, then the judgment nisi shall be set aside and a copy of the judgment that is set aside shall be served on the surety by personal service or certified mail. If the surety produces the defendant or provides to the court reasonable mitigating circumstances upon such showing, then the forfeiture shall not be made final. If the forfeiture is made final, a copy of the final judgment shall be served on the surety within ten (10) working days by either personal service or certified mail. Reasonable mitigating circumstances shall be that the defendant is incarcerated in another jurisdiction, that the defendant is hospitalized under a doctor's care, that the defendant is in a recognized drug rehabilitation program, that the defendant has been placed in a witness protection program and it shall be the duty of any such agency placing such defendant into a witness protection program to notify the court and the court to notify the surety, or any other reason justifiable to the court.

(d) Execution upon the final judgment shall be automatically stayed for ninety (90) days from the date of entry of the final judgment. If, at any time before execution of the final judgment, the defendant appears in court either voluntarily or in custody after surrender or arrest, the court shall on its own motion direct that the forfeiture be set aside and the bond exonerated as of the date the defendant first appeared in court.

(2) If a final judgment is entered against a surety licensed by the Department of Insurance and has not been set aside after ninety (90) days, or later if such time is extended by the court issuing the judgment nisi, then the court shall order the department to revoke the authority of the surety to write bail bonds. The commissioner shall, upon notice of the court, notify the surety within five (5) working days of receipt of revocation. If after ten (10) working days of such notification the revocation order has not been set aside by the court, then the commissioner shall revoke the authority of the surety and all agents of the surety and shall notify the sheriff of every county of such revocation.

(3) If within eighteen (18) months of the date of the final forfeiture the defendant appears for court, is arrested or surrendered to the court, or if the defendant is found to be incarcerated in another jurisdiction and a hold order placed on the defendant, then the amount of bail, less reasonable extradition cost, excluding attorney fees, shall be refunded by the court upon application by the surety.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 5; 1857, ch. 64, art. 292; 1880, § 3043; 1892, § 1396; 1906, § 1468; Hemingway's 1917, § 1226; 1930, § 1248; 1942, § 2491; Laws, 1996, ch. 317, § 1; Laws, 1999, ch. 428, § 1; Laws, 2001, ch. 547, § 1; Laws, 2009, ch. 520, § 3; Laws, 2011, ch. 463, § 1; Laws, 2013, ch. 424, § 1, eff from and after July 1, 2013.

Cross References — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Service of scire facias.
3. Amendment of scire facias.
4. Entry of judgment final.
5. Relief of sureties.

1. In general.

Trial court did not err in ordering defendant's arrest and reincarceration after defendant had been released on bond on a charge of aggravated assault but failed to appear for arraignment on the charge. Ray v. State, 844 So. 2d 483, 2002 Miss. App. LEXIS 690 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 485 (Miss. Ct. App. 2003).

The rule announced in previous cases that a forfeiture judgment is properly entered against the sureties of a defendant who fails to appear for trial due to his incarceration in another jurisdiction is overruled insofar as professional bondsmen are concerned, thus making the decisions in those case applicable only to nonprofessional bondsmen. Wood v. State, 345 So. 2d 616, 1977 Miss. LEXIS 2470 (Miss. 1977).

A bail bondsman is entitled to an extension of time delaying final judgment when he can establish to the court's satisfaction that the defendant is in the lawful custody of another jurisdiction and previous cases which hold otherwise are overruled. Wood v. State, 345 So. 2d 616, 1977 Miss. LEXIS 2470 (Miss. 1977).

The illness of a defendant which prevents his appearance in court as required by the condition of his bail bond is an Act of God for which no forfeiture should be taken against his surety. United Bonding Ins. Co. v. State, 252 Miss. 428, 175 So. 2d 182, 1965 Miss. LEXIS 1116 (Miss. 1965).

2. Service of scire facias.

Service of process on a bail bondsman's agent was insufficient when defendant failed to appear at trial because by statute an agent could not be served to achieve service of process on a bail bondsman. However, because the bail bondsman remained as surety for defendant, reversal and remand were appropriate for proper process of scire facias to be had on the bail bondsman, at which point the trial court could proceed in accordance with the applicable law. Newell v. State, 282 So. 3d 655, 2019 Miss. App. LEXIS 335 (Miss. Ct. App. 2019).

Issuance and "not found" return of second scire facias must be accomplished five days before return day, and failure to comply with this requirement rendered final judgment void for lack of process. Resolute Ins. Co. v. State, 308 So. 2d 924, 1975 Miss. LEXIS 1860 (Miss. 1975).

The service of a scire facias on a forfeited bail bond must be served on the sureties before the return day of the summons. Robertson v. State, 87 Miss. 285, 39 So. 478, 1905 Miss. LEXIS 113 (Miss. 1905).

Two returns of "not found" on a writ of scire facias is by the statute made equal to the service of the same, but it does not make service or such returns as to all the parties a prerequisite to judgment final against those who are served. Saffold v. State, 60 Miss. 928, 1883 Miss. LEXIS 38 (Miss. 1883).

3. Amendment of scire facias.

The scire facias can be amended. Curry v. State, 39 Miss. 511, 1860 Miss. LEXIS 82 (Miss. 1860); Tucker v. State, 55 Miss. 452, 1877 Miss. LEXIS 157 (Miss. 1877).

4. Entry of judgment final.

A proceeding to make final a judgment nisi is a civil action and not criminal. Washington v. State, 98 Miss. 150, 53 So. 416, 1910 Miss. LEXIS 45 (Miss. 1910).

Where the scire facias is not supported in a material particular by the judgment nisi a judgment final inconsistent with the judgment nisi is erroneous. Smith v. State, 76 Miss. 728, 25 So. 491, 1899 Miss. LEXIS 8 (Miss. 1899).

Two returns of "not found" on a writ of scire facias is by the statute made equal to the service of the same, but it does not make service or such returns as to all the parties a prerequisite to judgment final against those who are served. Saffold v. State, 60 Miss. 928, 1883 Miss. LEXIS 38 (Miss. 1883).

If judgment final have been taken by default on a scire facias, a variance between the bond and the scire facias will not avail on appeal. Ditto v. State, 30 Miss. 126, 1855 Miss. LEXIS 70 (Miss. 1855); Saffold v. State, 60 Miss. 928, 1883 Miss. LEXIS 38 (Miss. 1883).

It is not error to enter judgment by default on a scire facias to enforce a judgment nisi while there is a plea to the indictment undisposed of. Ditto v. State, 30 Miss. 126, 1855 Miss. LEXIS 70 (Miss. 1855).

5. Relief of sureties.

Forfeiture of a pretrial bond was not proper under this section and the surety was entitled to recover its bond where, after conviction, the defendant was released on the existing bond plus an additional bond, but the surety was not notified nor did he accept a new obligation for posttrial bond. Frontier Ins. Co. v. State, 741 So. 2d 1021, 1999 Miss. App. LEXIS 366 (Miss. Ct. App. 1999).

The release of sureties on a bail bond from liability thereon is not within the discretion of the courts; they being authorized to grant such relief only when a legal right thereto has been made to appear. Nix v. State, 213 So. 2d 554, 1968 Miss. LEXIS 1292 (Miss. 1968), overruled, Wood v. State, 345 So. 2d 616, 1977 Miss. LEXIS 2470 (Miss. 1977); Stewart v. State, 150 Miss. 545, 117 So. 533, 1928 Miss. LEXIS 187 (Miss. 1928).

Where pursuant to a court order of commitment, secured at the instance of the attorneys for the accused and principal obligor on the bail bond, the sheriff carried the accused to the state hospital for a sanity examination, and subsequently the accused was found sane and released from the institution, but failed to appear for trial, the order of commitment did not relieve the sureties on the bail bond since there was no arrest of the accused for the same or other crime, or any interference with the custody of the sureties such as the law could regard as an excuse for the failure of the accused to appear for trial. Hall v. State, 231 Miss. 767, 97 So. 2d 649, 1957 Miss. LEXIS 564 (Miss. 1957).

OPINIONS OF THE ATTORNEY GENERAL

Under this section, once a scire facias has been returned to the court, and lacking a sufficient showing of cause, a final judgment may be entered against the surety for the forfeiture of bond. A final judgment may be enforced the same as any other judgment, including attachments, executions and garnishments. Schmidt, May 31, 1996, A.G. Op. #96-0328.

This section prescribes the procedure for forfeiture of bail bonds. The bond is due at the time final judgment is entered. Perry, August 23, 1996, A.G. Op. #96-0558.

A scire facias may be personally served on a limited surety agent, and that process will be binding on the insurer represented by that agent. Johnson, November 6, 1998, A.G. Op. #98-0672.

The statute authorizes a court to order bail forfeited any time a defendant fails to appear for any proceeding as ordered by the court; if the defendant fails to appear for the scheduled trial of a non-traffic offense, he may be tried in his absence and sentenced accordingly; however, there must be enough evidence presented at the trial in absentia to support a conviction, and, if the prosecutor or witnesses do not appear, the defendant cannot be convicted. Shirley, May 1, 2000, A.G. Op. #2000-0197.

A municipality does not have the authority to require a bondsman to locate an office within the city limits in order to write bonds for municipal prisoners. Lawrence, Jr., Feb. 8, 2002, A.G. Op. #02-0007.

Upon a bond forfeiture, the surety should be notified of the forfeiture by service of a scire facias along with a copy of the judgment nisi and bench warrant attached. The scire facias may be served either by personal service or by certified mail. Personal service upon the surety may be accomplished by personally delivering the scire facias to the professional bondsman. Aldridge, Sept. 24, 2004, A.G. Op. 04-0464.

Personal service of a scire facias may be performed by a constable, sheriff or deputy, or any other reputable person at least 18 years of age that the justice court clerk may appoint. This would include the clerk or a deputy clerk. Personal service could be accomplished by having the professional bondsman pick up the scire facias along with the judgment nisi and bench warrant or by having the clerk or deputy clerk deliver the scire facias and attachments to the professional bondsman. A proper return should be made to the court by the person serving the scire facias. Aldridge, Sept. 24, 2004, A.G. Op. 04-0464.

Where a judgment has been rendered against the surety and the bond has not been paid, the court should require payment of the judgment by surety; if the defendant is surrendered to the court or incarcerated in accordance with Section 99-5-25(3) "the amount of bail, less reasonable extradition cost, excluding attorney fees, shall be refunded by the court upon application by the surety."

RESEARCH REFERENCES

ALR.

Appealability of order relating to forfeiture of bail. 78 A.L.R.2d 1180.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 A.L.R.4th 1192.

State statutes making default on bail a separate criminal offense. 63 A.L.R.4th 1064.

Forfeiture of bail for breach of conditions of release other than that of appearance. 68 A.L.R.4th 1082.

What is proper venue under Rule 18 of the Federal Rules of Criminal Procedure for offense of bail jumping. 52 A.L.R. Fed. 901.

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 135 et seq.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 111 et seq., (forfeiture proceedings).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 121 et seq., (vacation of forfeiture).

CJS.

8 C.J.S., Bail §§ 150, 152 et seq.

§ 99-5-27. Bail agent may arrest and surrender principal; return of defendant out on bond.

(1)(a) "Surrender" means the delivery of the defendant, principal on bond, physically to the sheriff or chief of police or in his absence, his jailer, and it is the duty of the sheriff or chief of police, or his jailer, to accept the surrender of the principal when presented and such act is complete upon the execution of verbal or written surrender notice presented by a bail agent and shall relieve the bail agent of liability on the principal's bond.

(b) A bail agent may surrender the principal if the principal is found to be detained on another charge. If the principal is found incarcerated in another jurisdiction, the bail agent may surrender him by verbal or written notice of surrender to the sheriff or chief of police, or his jailer, of that jurisdiction and the notice of surrender shall act as a "Hold Order" and upon presentation of written surrender notice to the court of proper jurisdiction, the court shall order a "Hold Order" placed on the principal for the court and shall relieve the bail agent of liability on the principal's bond, with the provision that, upon release from incarceration in the other jurisdiction, return of the principal to the sheriff shall be the responsibility of the bail agent. The bail agent shall satisfy the responsibility to return a principal held by a "Hold Order" in another jurisdiction upon release from the other jurisdiction either by personally returning the principal to the sheriff at no cost to the county or, where the other jurisdiction will not release the principal to any person other than a law enforcement officer, by reimbursing to the county the reasonable cost of the return of the principal, not to exceed the cost that would be entailed if the first option were available.

(c) The surrender of the principal by the bail agent, within the time period provided in Section 99-5-25, shall serve to discharge the bail agent's liability to the State of Mississippi and any of its courts; but if this is done after forfeiture of the bond or recognizance, the court shall set aside the judgment nisi or final judgment upon filing of surrender notice by the bail agent.

(2)(a) A bail agent, at any time, may surrender the principal to any law enforcement agency or in open court in discharge of the bail agent's liability on the principal's bond if the law enforcement agency that was involved in setting the original bond approves of such surrender, to the State of Mississippi and any of its courts and at any time may arrest and transport its principal anywhere or may authorize another to do so, may be assisted by any law enforcement agency or its agents anywhere upon request of bail and may receive any information available to law enforcement or the courts pertaining to the principal for the purpose of safe surrender or for any reasonable cause in order to safely return the principal to the custody of law enforcement and the court.

(b) A bail agent, at any time, may arrest its principal anywhere or authorize another to do so for the purpose of surrender of the principal on bail bond. Failure of the sheriff or chief of police or his jailer, any law enforcement agency or its agents or the court to accept surrender by a bail agent shall relieve the bail agent of any liability on the principal's bond, and the bond shall be void.

(3) A bail agent, at any time, upon request by the defendant or others on behalf of the defendant, may privately interview the defendant to obtain information to help with surrender before posting any bail bond on behalf of the defendant. All licensed bail agents shall have equal access to jails or detention facilities for the purpose of such interviews, the posting of bail bonds and the surrender of the principal.

(4) Upon surrender, the court, after full review of the defendant and the pending charges, in open court, may discharge the prisoner on his giving new bail, but if he does not give new bail, he shall be detained in jail.

HISTORY: Codes, 1880, § 3045; 1892, § 1398; 1906, § 1470; Hemingway's 1917, § 1228; 1930, § 1250; 1942, § 2493; Laws, 1997, ch. 335, § 2; Laws, 1999, ch. 399, § 2; Laws, 2011, ch. 463, § 2, eff from and after July 1, 2011.

Cross References — Guaranteed arrest bond certificate in lieu of cash bail for certain traffic violations, see § 63-9-27.

JUDICIAL DECISIONS

1. In general.

Bail bondsmen do not have authority to surrender a principal for civil debt. Brooks v. Pennington, 995 So. 2d 733, 2007 Miss. App. LEXIS 378 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

In cases where bail bondsmen attempt to surrender a principal, the following duties must be satisfied: (1) the sheriff or his agent must verify the identity of the defendant, that the defendant is in fact who the bondsman says he is; (2) the sheriff or his agent must verify the identity of the bondsman, and that the surrendering individual is in fact a licensed professional bondsman entitled to invoke Miss. Code Ann. § 99-5-27; and (3) the sheriff or his agent must use reasonable care to verify that the bond upon which the accused is being surrendered is presently valid and binding on the principal and surety. Brooks v. Pennington, 995 So. 2d 733, 2007 Miss. App. LEXIS 378 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

Bail bondsmen, who were looking to arrest a man for jumping bail, did not have the authority to search the man's mother's home without a search warrant. Milburn v. Vinson, 850 So. 2d 1219, 2002 Miss. App. LEXIS 562 (Miss. Ct. App. 2002), cert. dismissed, 2004 Miss. LEXIS 607 (Miss. May 27, 2004).

Trial court did not err in ordering defendant's arrest and reincarceration after defendant had been released on bond on a charge of aggravated assault but failed to appear for arraignment on the charge. Ray v. State, 844 So. 2d 483, 2002 Miss. App. LEXIS 690 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 485 (Miss. Ct. App. 2003).

The release of sureties on a bail bond from liability thereon is not within the discretion of the courts; they being authorized to grant such relief only when a legal right thereto has been made to appear. Nix v. State, 213 So. 2d 554, 1968 Miss. LEXIS 1292 (Miss. 1968), overruled, Wood v. State, 345 So. 2d 616, 1977 Miss. LEXIS 2470 (Miss. 1977); Stewart v. State, 150 Miss. 545, 117 So. 533, 1928 Miss. LEXIS 187 (Miss. 1928).

Where a defendant in criminal proceedings failed to appear and defaulted, but was surrendered by his sureties in open court before a final judgment of forfeiture of his bail bonds was entered, such surrender under the clear terms of Code 1942, § 2493, had the effect of discharging the surety's liability. Resolute Ins. Co. v. State, 233 So. 2d 788, 1970 Miss. LEXIS 1672 (Miss. 1970).

Statutes authorizing sureties to arrest principal anywhere, or to authorize another to do so, are declaratory of common law. Cartee v. State, 162 Miss. 263, 139 So. 618 (Miss. 1932).

Constable who, at surety's request, accompanied surety to another district to accept surrender of principal, had duty and right of arresting principal. Cartee v. State, 162 Miss. 263, 139 So. 618 (Miss. 1932).

In homicide prosecution against constable, refusal to instruct that it was constable's duty to accept surety's surrender of deceased principal held reversible error. Cartee v. State, 162 Miss. 263, 139 So. 618 (Miss. 1932).

OPINIONS OF THE ATTORNEY GENERAL

A private probation service does not have the same arresting authority that a bail bondsman has under this section. Perry, June 28, 1996, A.G. Op. #96-0399.

A Mississippi court may issue a "hold order" to the sheriff of another Mississippi county, and, in such cases, the bail will be entitled to a refund. Perry, May 26, 2000, A.G. Op. #2000-0248.

A bondsman may surrender his principal in accordance with the statute at any time, with or without cause, and relieve his obligation and liability to the court; specifically, a bondsman's surrender right is not limited to situations where the defendant is found detained in another jurisdiction. Martin, May 26, 2000, A.G. Op. #2000-0282.

When a defendant who is released on bond is found incarcerated in another jurisdiction, the bondsman may surrender the defendant by notifying the authorities that are holding the defendant that he wishes to surrender the defendant and that a hold order is being requested; the bondsman should then present a written surrender notice to the court that has jurisdiction over the bond notifying the court of the defendant's incarceration in another jurisdiction and request the court to place a "hold order" on the defendant, and the court should then send a "hold order" to the authorities that have incarcerated the defendant; the bondsman's liability on the bond should then be released except for the costs of returning the defendant from the location of incarceration to the court with proper jurisdiction; the judge may prepare the "hold order" himself or direct the bondsman to prepare the "hold order" that is to be sent to the authorities holding the defendant; if a bondsman properly surrenders a defendant but the court fails to issue a "hold order" on the defendant, the bondsman should be released from his obligation on the bond and an arrest warrant may be issued for the defendant. Aldridge, Feb. 15, 2002, A.G. Op. #02-0046.

Where a prisoner is in custody of another jurisdiction, the bail must either personally return the prisoner or pay to the county the reasonable cost of the return if the other jurisdiction will not release the prisoner to bail. Rawson, Apr. 29, 2005, A.G. Op. 05-0088.

RESEARCH REFERENCES

ALR.

Bail: duration of surety's liability on pretrial bond. 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond. 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 A.L.R.4th 600.

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 107 et seq., 120 et seq.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 71 et seq., (voluntary surrender of principal).

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 91, 92, (authorization by surety to arrest principal).

CJS.

8 C.J.S., Bail § 143.

§ 99-5-29. Surety may cause arrest of principal by officer.

The sheriff or a constable in a proper case, upon the request of a surety in any bond or recognizance, and tender of the legal fee for executing a capias in a criminal case, and the production of a certified copy of the bond of recognizance, shall arrest, within his county, the principal in the bond or recognizance. The surety or his agent shall accompany the officer to receive the person.

HISTORY: Codes, 1880, § 3046; 1892, § 1399; 1906, § 1471; Hemingway's 1917, § 1229; 1930, § 1251; 1942, § 2494.

JUDICIAL DECISIONS

1. In general.

Statutes authorizing sureties to arrest principal anywhere, or to authorize another to do so, are declaratory of common law. Cartee v. State, 162 Miss. 263, 139 So. 618 (Miss. 1932).

Constable who, at surety's request, accompanied surety to another district to accept surrender of principal, had duty and right of arresting principal. Cartee v. State, 162 Miss. 263, 139 So. 618 (Miss. 1932).

RESEARCH REFERENCES

Am. Jur.

8A Am. Jur. 2d, Bail and Recognizance §§ 107 et seq.

4 Am. Jur. Pl & Pr Forms (Rev), Bail and Recognizance, Forms 91, 92, (authorization by surety to arrest principal).

CJS.

8 C.J.S., Bail § 143.

§ 99-5-31. Mittimus in bailable cases to fix the bail.

When a defendant charged with a criminal offense shall be committed to jail by a court, judge, justice or other officer, for default in not giving bail, it is the duty of such court or officer to state in the mittimus the nature of the offense, the county where committed, the amount of bail, and number of sureties required, and to direct the sheriff of the county where such party is ordered to be confined to release him, on his entering into bond as required by the order of the court or committing officer; and this shall apply to a case where, on habeas corpus, an order for bail may be made.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 12(1); 1857, ch. 64, art. 287; 1871, § 2787; 1880, § 3037; 1892, § 1390; 1906, § 1462; Hemingway's 1917, § 1220; 1930, § 1242; 1942, § 2485.

OPINIONS OF THE ATTORNEY GENERAL

Once justice court judge issues mittimus to sheriff setting forth amount of bail and number of sureties required, sheriff can only release defendant when bond or other conditions set by judge have been fully satisfied and failure of sheriff to comply with mittimus could result in sheriff standing as special bail and having judgment rendered against him. Vess, March 18, 1994, A.G. Op. #94-0124.

RESEARCH REFERENCES

ALR.
Insanity of accused as affecting right to bail in criminal case. 11 A.L.R.3d 1385.

Am. Jur.
8A Am. Jur. 2d, Bail and Recognizance §§ 1, 2 et seq.

CJS.
8 C.J.S., Bail §§ 37 et seq.

Lawyers' Edition.
Considerations affecting grant, continuance, reduction, or revocation of bail by individual Justice of Supreme Court. 30 L. Ed. 2d 952.

§ 99-5-33. Accused committed to prison if injured party is dangerously wounded.

If a person be dangerously wounded the party accused shall be committed to prison until it be known whether the person wounded will recover or not, unless it appear to the court of inquiry that the case, in any event, would not amount to murder; in which case, or in the event that the person wounded do or will recover, the accused shall be dealt with as in other cases.

HISTORY: Codes, 1857, ch. 64, art. 283; 1871, § 2783; 1880, § 3036; 1892, § 1389; 1906, § 1461; Hemingway's 1917, § 1219; 1930, § 1241; 1942, § 2484.

RESEARCH REFERENCES

ALR.
Pretrial preventive detention by state court. 75 A.L.R.3d 956.

§ 99-5-35. When prisoner charged with capital offense entitled to bail.

Any person having been twice tried on an indictment charging a capital offense, wherein each trial has resulted in a failure of the jury to agree upon his guilt or innocence, shall be entitled to bail in an amount to be set by the court.

HISTORY: Codes, 1942, § 2485.5; Laws, 1966, ch. 382, § 1, eff from and after passage (approved June 15, 1966).

Cross References — Bail provisions under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-25.

RESEARCH REFERENCES

ALR.
Propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials. 4 A.L.R.4th 1274.

Am. Jur.
8A Am. Jur. 2d, Bail and Recognizance § 96.

CJS.
8 C.J.S., Bail
Release and Detention Pending Proceedings §§ 48-52, 54.

§ 99-5-37. Domestic violence, aggravated domestic violence, aggravated stalking, knowing violation of bond or knowing violation of domestic abuse protection order; required appearance before judge; considerations; conditions.

(1) In any arrest for (a) a misdemeanor that is an act of domestic violence as defined in Section 99-3-7(5); (b) aggravated domestic violence as defined in Section 97-3-7(4); (c) aggravated stalking as defined in Section 97-3-107(2); (d) a knowing violation of a condition of bond imposed pursuant to this section; or (e) a knowing violation of a domestic abuse protection order issued pursuant to Section 93-21-1 et seq., or a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse, no bail shall be granted until the person arrested has appeared before a judge of the court of competent jurisdiction. The appearance may be by telephone. Nothing in this section shall be construed to interfere with the defendant's right to an initial appearance or preliminary hearing.

(2) Upon setting bail, the judge may impose on the arrested person a holding period not to exceed twenty-four (24) hours from the time of the initial appearance or setting of bail. The judge also shall give particular consideration

to the exigencies of the case, including, but not limited to, (a) the potential for further violence; (b) the past history, if any, of violence between the defendant and alleged victim; (c) the level of violence of the instant offense; (d) any threats of further violence; and (e) the existence of a domestic violence protection order prohibiting the defendant from engaging in abusive behavior, and shall impose any specific conditions on the bond as he or she may deem necessary. Specific conditions which may be imposed by the judge may include, but are not limited to, the issuance of an order prohibiting the defendant from contacting the alleged victim prior to trial, prohibiting the defendant from abusing or threatening the alleged victim or requiring defendant to refrain from drug or alcohol use.

(3) All bond conditions imposed by the court shall be entered into the corresponding Uniform Offense Report and written notice of the conditions shall be provided at no cost to the arrested person upon his or her release, to the appropriate law enforcement agency, and to the clerk of the court. Upon request, a copy of the written notice of conditions shall be provided at no cost to the victim. In any prosecution for violation of a bond condition imposed pursuant to this section, it shall not be a defense that the bond conditions were not entered into the corresponding Uniform Offense Report.

(4) Within twenty-four (24) hours of a violation of any bond conditions imposed pursuant to this section, any law enforcement officer having probable cause to believe that the violation occurred may make a warrantless arrest of the violator.

(5) Nothing in this section shall be construed to interfere with the judges' authority, if any, to deny bail or to otherwise lawfully detain a particular defendant.

HISTORY: Laws, 1998, ch. 525, § 2; Laws, 2003, ch. 431, § 1; Laws, 2007, ch. 589, § 11; Laws, 2009, ch. 433, § 2; Laws, 2010, ch. 536, § 3; Laws, 2012, ch. 514, § 10, eff from and after July 1, 2012.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference appearing in the first sentence. The reference to "Section 99-3-7" was changed to "Section 97-3-7." The Joint Committee ratified the correction at its April 28, 1999 meeting.

OPINIONS OF THE ATTORNEY GENERAL

Defendant who has been convicted of a misdemeanor which is an act of domestic violence and has filed an appeal may have conditions imposed on his appeal bond similar to those of a bail bond. A violation of such conditions may be remedied with revocation of the bond and incarceration pending appeal. Tallant, Sept. 26, 2003, A.G. Op. 03-0485.

§ 99-5-38. Use of global positioning monitoring system as condition of bond for defendant in domestic violence case; definitions; information to be provided victim.

(1)(a) "Domestic violence" has the same meaning as the term "abuse" as defined in Section 93-21-3.

(b) "Global positioning monitoring system" means a system that electronically determines and reports the location of an individual through the use of a transmitter or similar device carried or worn by the individual that transmits latitude and longitude data to a monitoring entity through global positioning satellite technology. The term does not include a system that contains or operates global positioning system technology, radio frequency identification technology or any other similar technology that is implanted in or otherwise invades or violates the individual's body.

(2) The court may require as a condition of release on bond that a defendant charged with an offense involving domestic violence:

(a) Refrain from going to or near a residence, school, place of employment, or other location, as specifically described in the bond, frequented by an alleged victim of the offense;

(b) Carry or wear a global positioning monitoring system device and, except as provided by subsection (8), pay the costs associated with operating that system in relation to the defendant; or

(c) If the alleged victim of the offense consents after receiving the information described by subsection (4) and, except as provided by subsection (8), pay the costs associated with providing the victim with an electronic receptor device that:

(i) Is capable of receiving the global positioning monitoring system information from the device carried or worn by the defendant; and

(ii) Notifies the victim if the defendant is at or near a location that the defendant has been ordered to refrain from going to or near under paragraph (a).

(3) Before imposing a condition described by subsection (2)(a), the court must afford an alleged victim an opportunity to provide the court with a list of areas from which the victim would like the defendant excluded and shall consider the victim's request, if any, in determining the locations the defendant will be ordered to refrain from going to or near. If the court imposes a condition described by subsection (2)(a), the court shall specifically describe the locations that the defendant has been ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.

(4) Before imposing a condition described by subsection (2)(c), the court must provide to an alleged victim information regarding:

(a) The victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the court terminate the victim's participation;

(b) The manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements;

(c) Any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations;

(d) Any sanctions that the court may impose on the defendant for violating a condition of bond imposed under this section;

(e) The procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails;

(f) Community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of domestic violence; and

(g) The fact that the victim's communications with the court concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

(5) In addition to the information described by subsection (4), the court shall provide to an alleged victim who participates in a global positioning monitoring system under this section the name and telephone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond imposed under this section.

(6) In determining whether to order a defendant's participation in a global positioning monitoring system under this section, the court shall consider the likelihood that the defendant's participation will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the alleged victim before trial.

(7) An alleged victim may request that the court terminate the victim's participation in a global positioning monitoring system at any time. The court may not impose sanctions on the victim for requesting termination of the victim's participation in or refusing to participate in a global positioning monitoring system under this section.

(8) The court may allow a defendant to perform community service in lieu of paying the costs required by subsection (2)(b) or (c) if the court determines that the defendant is indigent.

(9) The court that imposes a condition described by subsection (2)(a) or (b) shall order the entity that operates the global positioning monitoring system to notify the court and the appropriate local law enforcement agency if a defendant violates a condition of bond imposed under this section.

(10) This section does not limit the authority of the court to impose any other reasonable conditions of bond or enter any orders of protection under other applicable statutes.

HISTORY: Laws, 2011, ch. 415, § 1, eff from and after July 1, 2011.

§ 99-5-39. Appearance bond as condition of any court ordered supervision; defendant's failure to appear as grounds for forfeiture of bond.

(1) As a condition of any probation, community control, payment plan for any fine imposed or any other court ordered supervision, the court may order the posting of a bond to secure the appearance of the defendant at any subsequent court proceeding or to otherwise enforce the orders of the court. The appearance bond shall be filed by a duly licensed professional bail agent with the court or with the sheriff who shall provide a copy to the clerk of court.

(2) The court may issue an order sua sponte or upon notice by the clerk or the probation officer that the person has violated the terms of probation, community control, court ordered supervision or other applicable court order to produce the defendant. The court or the clerk of the court shall give the bail agent a minimum of a seventy-two-hour notice to have the defendant before the court. If the bail agent fails to produce the defendant in court or to the sheriff at the time noticed by the court or the clerk of court, the bond shall be forfeited according to the procedures set forth in Section 99-5-25. The defendant's failure to appear shall be the sole grounds for forfeiture of the appearance bond.

(3) The provisions of Sections 83-39-1 et seq. and 99-5-1 et seq. shall govern the relationship between the parties except where they are inconsistent with this section.

HISTORY: Laws, 2007, ch. 390, § 3; Laws, 2008, ch. 420, § 1, eff from and after July 1, 2008.

Cross References — Bail bonds and bondsmen, generally, see §§ 83-39-1 et seq.

CHAPTER 7.

INDICTMENT

Sec.

99-7-1. Indictment may charge offenses according to common law or statute.
99-7-2. When two or more offenses may be charged in single indictment; trial, verdicts, and sentences.
99-7-3. Formal or technical words not necessary.
99-7-5. Allegations of time; want of perfect venue.
99-7-7. How instruments pleaded.
99-7-9. Presentment; entry on minutes of court; warrant to issue; copy of indictment to be served on defendant; informing victim as to status of charge.
99-7-11. Concurrence of twelve grand jurors required for finding.
99-7-13. Secret record book; accused may be tried on copy made from record book.
99-7-15. Authority to inspect indictment limited to certain officers until arrest made.
99-7-17. Dilatory pleas; must be verified by oath.
99-7-19. Dilatory pleas; amendment of indictment or information.
99-7-21. Demurrers; when filed; amendment of indictment.
99-7-23. Motions to quash.
99-7-25. Amendment where name of unknown defendant is discovered.
99-7-27. Gambling or gaming.
99-7-29. Intoxicating beverage offenses.
99-7-31. Terms of indictment for larceny or embezzlement of money.
99-7-33. Libel.
99-7-35. Lotteries.
99-7-37. Murder and manslaughter.
99-7-39. Perjury.
99-7-41. Perjury; subornation of perjury.

§ 99-7-1. Indictment may charge offenses according to common law or statute.

Offenses at common law, indictable and punishable by special statutory provision, may be indicted as described or charged according to the common law or according to the statute, and, on conviction, the offenders shall be punished as prescribed.

HISTORY: Codes, 1857, ch. 64, art. 357; 1871, § 2864; 1880, § 3099; 1892, § 1453; 1906, § 1526; Hemingway's 1917, § 1288; 1930, § 1313; 1942, § 2561.

Cross References — Rights of accused in criminal prosecution generally, see Miss. Const. Art. 3, § 26.

Charging the grand jury, see MRCrP 13.2.

Form of the indictment, see MRCrP 14.1.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Indictment sufficient.

1. In general.

While the State is not required to prosecute a criminal defendant under the statute with a lesser penalty when the facts which constitute a criminal offense may fall under either of two statutes, if the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty. Thus, a defendant who was indicted for escape was required to be prosecuted under § 97-9-45, which simply takes away earned time towards parole, rather than § 97-9-49, which provides for a possible sentence of up to two years, where the indictment was silent as to the applicable statute. Beckham v. State, 556 So. 2d 342, 1990 Miss. LEXIS 11 (Miss. 1990).

It is only necessary that misdemeanors be substantially charged and in charging them, the use of technical terms is not essential to a description of the offense. Wilson v. State, 80 Miss. 388, 31 So. 787, 1902 Miss. LEXIS 250 (Miss. 1902).

Extortion in office, under Code 1906, § 1161 [Code 1942, § 2144], being a common-law offense, may, under this section [Code 1942, § 2561], be charged according to the statute or common law, and it is not necessary under the latter to charge that it was "knowingly" done. State v. Jones, 71 Miss. 872, 15 So. 237, 1894 Miss. LEXIS 33 (Miss. 1894).

The statute does not apply in a case where the act charged is a misdemeanor at common law and a felony by statute. In such case the offense must be charged to have been committed "feloniously." Wile v. State, 60 Miss. 260, 1882 Miss. LEXIS 45 (Miss. 1882).

2. Indictment sufficient.

Appellate court overruled defendant's assertion that the indictment was defective because it did not state the statute under which he was charged, because the indictment clearly set out the elements of the crime with which he was charged; it was not necessary for an indictment to state a specific statute under which a defendant was charged. Trice v. State, 992 So. 2d 638, 2007 Miss. App. LEXIS 841 (Miss. Ct. App. 2007), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

RESEARCH REFERENCES

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Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation. 2 A.L.R.4th 980.

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Effect on operation of Speedy Trial Act (18 USCS §§ 3161 et seq.) of indictment returned by grand jury whose term has expired. 64 A.L.R. Fed. 916.

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§ 99-7-2. When two or more offenses may be charged in single indictment; trial, verdicts, and sentences.

(1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

(3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.

(4) The jury or the court, in cases in which the jury is waived, shall return a separate verdict for each count of an indictment drawn under subsection (1) of this section.

(5) Nothing contained in this section shall be construed to prohibit the court from exercising its statutory authority to suspend either the imposition or execution of any sentence or sentences imposed hereunder, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or any other sentence or sentences previously imposed upon the defendant.

HISTORY: Laws, 1986, ch. 444, eff from and after July 1, 1986.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Illustrative cases.

1. In general.

Trial court's denial of defendant's motion to sever was not an abuse of discretion because the State presented a prima facie case that the crimes were part of a common scheme or plan; defendant made no showing that the crimes were separate and distinct transactions. Graves v. State, 216 So. 3d 1152, 2016 Miss. LEXIS 150 (Miss. 2016).

Trial court erred in imposing a general sentence because defendant was convicted of three separate offenses; specific sentences for each conviction were required. Aucoin v. State, 17 So. 3d 142, 2009 Miss. App. LEXIS 155 (Miss. Ct. App. 2009), cert. denied, 2009 Miss. LEXIS 434 (Miss. Sept. 17, 2009), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 435 (Miss. 2009).

Circuit court did not err in refusing to sever Counts I and II of defendant's indictment as they were separated by only one day, the alleged crimes were the same, and they involved substantially the same facts and witnesses. Parker v. State, 5 So. 3d 458, 2008 Miss. App. LEXIS 580 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 131 (Miss. 2009).

Indictment stated that the offenses giving rise to the four counts with which defendant was charged were all part of a common scheme or plan; therefore, it was permissible for the State to charge defendant in a multi-count indictment. Davis v. State, 5 So. 3d 435, 2008 Miss. App. LEXIS 366 (Miss. Ct. App. 2008).

Inclusion of the language found in the multicount indictment statute, Miss. Code Ann. § 99-7-2(1), is not necessary for an indictment to be valid. Miller v. State, 973 So. 2d 319, 2008 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. dismissed, 981 So. 2d 298, 2008 Miss. LEXIS 218 (Miss. 2008).

Defendant did not show ineffective assistance of counsel where, even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against defendant, he could not reasonably have expected a different result on the manufacture-of-marijuana charge. Williams v. State, 971 So. 2d 581, 2007 Miss. LEXIS 571 (Miss. 2007).

Defendant's motion for post-conviction relief was properly denied where the state did not improperly indict him under multiple indictments; Miss. Code Ann. § 99-7-2(1) made single, multi-count indictments permissive, not mandatory. Jones v. State, 956 So. 2d 310, 2006 Miss. App. LEXIS 871 (Miss. Ct. App. 2006).

Trial court properly dismissed defendant's motion for post-conviction relief after he was convicted of possession of more than two grams but less than 10 grams of cocaine, possession of more than 30 grams but less than 250 grams of marijuana, and possession of a firearm by a convicted felon, where the sentencing order was not illegal because he was sentenced separately on each charge pursuant to Miss. Code Ann. § 99-7-2(3). Ward v. State, 944 So. 2d 908, 2006 Miss. App. LEXIS 860 (Miss. Ct. App. 2006).

Trial court properly denied defendant's motion to sever three prescription forgery counts that occurred over a five-month period because the trial court applied the Corley Factors and found that five months was not a significant amount of time so as to require severance, and the total evidence in the case would have been admissible in separate trials of each count under Miss. R. Evid. 404(b). Rushing v. State, 911 So. 2d 526, 2005 Miss. LEXIS 612 (Miss. 2005).

As to verdicts and the imposition of separate sentences, separate charges on a multicount indictment may be handled in one hearing. Stovall v. State, 873 So. 2d 1056, 2004 Miss. App. LEXIS 454 (Miss. Ct. App. 2004).

Defendant's capital murder convictions and death sentence were proper where the trial court did not err in denying defendant's motion to sever count one of the indictment because the killings occurred within a few hours and were all part of the common scheme to rob his ex-father-in-law and eliminate any witnesses; additionally the murders were all interwoven and occurred at the same place and closely in time. Brawner v. State, 872 So. 2d 1, 2004 Miss. LEXIS 458 (Miss. 2004).

Multicount indictment is permissible if the offenses are based on the same act or transaction, if the offenses are so connected as to constitute a single transaction or occurrence, or if the offenses constitute parts of a common scheme or plan. Stone v. State, 867 So. 2d 1032, 2003 Miss. App. LEXIS 1026 (Miss. Ct. App. 2003).

Trial judge, in ruling on defendant's motion for severance, recognized that the offenses occurred at the same place, that the entire incident was over in a matter of minutes, and that there would be difficulties if the fact witnesses were allowed only to testify to a specific charge since the offenses were so interrelated that telling the story of what happened would be much harder if the offenses were severed; defendant did not make a showing of how each offense was separate and distinct such that there was no reversible error in the trial court's ruling. Riser v. State, 845 So. 2d 720, 2003 Miss. App. LEXIS 433 (Miss. Ct. App. 2003).

Trial court properly denied appellant's motion for postconviction relief; appellant's argument that it was error to have charged him in separate indictments was procedurally barred. Brooks v. State, 832 So. 2d 607, 2002 Miss. App. LEXIS 855 (Miss. Ct. App. 2002).

State was permitted to try charges of kidnapping and assault together because the charges were so intertwined and overlapping that they constituted one episode or event. Williams v. State, 791 So. 2d 895, 2001 Miss. App. LEXIS 311 (Miss. Ct. App. 2001).

The applicability of subsection (1) is not limited where some element of the necessary proof as to one charge would be inadmissible on the other charge were it being tried separately. Wright v. State, 797 So. 2d 1028, 2001 Miss. App. LEXIS 152 (Miss. Ct. App. 2001).

State bears burden of prima facie showing that offenses charged in multi-count indictment are within language of statute that allows multi-count indictments. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

In hearing for severance of multi-count indictment, if state meets its burden of prima facie showing that offenses are within language of statute allowing multi-count indictments, defense may rebut by showing that offenses were separate and distinct acts or transactions. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

In determining whether multi-count indictment warrants severance, trial court should consider time period between offenses, whether evidence proving each offense would be admissible to prove the other counts, and whether offenses are interwoven. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

If trial court follows proper procedure in determining whether multi-count indictment warrants severance, Supreme Court will give deference to trial court's findings on review, employing abuse of discretion standard. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

Charges of 2 counts of sexual battery and one count of attempted sexual battery were properly combined in indictment, where transactions upon which offenses were based occurred over period of 5 months, and offenses were committed only against one child even when other children were present and available targets, which showed common plan. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

When a defendant raises the issue of severance, a trial court should hold a hearing on the issue. The State has the burden of making a prima facie case showing that the offenses charged fall within the language of the statute allowing multi-count indictments. If the State meets its burden, the defendant may rebut by showing that the offenses were separate and distinct acts or transactions. In making its determination regarding severance, the trial court should pay particular attention to whether the time period between the occurrences is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven. If a trial court follows this procedure, the Supreme Court will review the trial court's decision under the abuse of discretion standard giving due deference to the trial court's findings. On review, the Supreme Court will defer to the trial court's findings even if the jury later acquits the defendant on one or more counts or if the Supreme Court concludes on appeal that a directed verdict, j.n.o.v. or new trial should have been granted on one or more counts. Corley v. State, 584 So. 2d 769, 1991 Miss. LEXIS 480 (Miss. 1991).

An indictment charging 2 rapes and one attempted rape committed by the defendant upon the same victim at different times was proper. The charges were properly joined under one indictment since they were part of a common scheme or plan, pursuant to the language of § 99-7-2(1)(b), in that they were connected by the identity of the victim and by the identity of the kind of act committed by the defendant. Furthermore, all of the evidence proving each count was fully admissible to prove each of the other counts and, therefore, if the State had tried the defendant at 3 separate trials, testimony as to the 2 other acts of rape would have been admissible at each of the 3 trials. Allman v. State, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

On convictions for kidnapping and rape pursuant to §§ 97-3-53 and 97-3-65, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was required to impose some lesser sentence than life, each sentence was to be imposed without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. Erwin v. State, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see Strahan v. State, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

A multi-count indictment is proper only where the charged offenses arise from a common transaction or occurrence or, when the occurrences are at different times, where that time period is insignificant. Thus, 2 burglaries could not be charged in the same indictment where the burglaries were committed on 2 different days and at least 2 days apart, the 2 houses involved in the burglaries belonged to different individuals and were miles apart, and nothing in the record indicated that there was a plan involved in burglarizing the houses. McCarty v. State, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

An indictment improperly joined 8 counts of making harassing telephone calls where the indictment charged the defendant with 2 different crimes on 2 different dates against 2 different victims. Gray v. State, 549 So. 2d 1316, 1989 Miss. LEXIS 436 (Miss. 1989).

A multiple-count indictment, charging murder and aggravated assault, was permissible where both the murder and the aggravated assault arose from a single fusillade, the defendant presented the same defense – self-defense – to the two charges, almost all of the evidence admissible against the defendant on the murder count was also admissible against him on the assault count and visa-versa, and no legally cognizable prejudice could be said to have resulted from the consolidation at trial of the 2 charges. Blanks v. State, 542 So. 2d 222, 1989 Miss. LEXIS 165 (Miss. 1989).

2. Illustrative cases.

Trial court properly considered the appropriate factors before denying defendant's motion to sever the two counts of the indictment; even in separate trials, the evidence would be admissible to prove the other count. Donaldson v. State, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

It was not error to try defendant for four murders at a single trial when there were four, single-count indictments rather than a multicount indictment. The State could have brought a multi-count indictment but was not required to do so. Flowers v. State, 240 So. 3d 1082, 2017 Miss. LEXIS 431 (Miss. 2017), rev'd, — U.S. —, 139 S. Ct. 2228, 204 L. Ed. 2d 638, 2019 U.S. LEXIS 4196 (U.S. 2019).

Trial court erred in refusing to sever the simple-assault charges from the rape charge, because 18 days passed between the two incidents, the charges were not based on the same act or transaction, and the victims were not the same. Lomax v. State, 192 So. 3d 975, 2016 Miss. LEXIS 235 (Miss. 2016).

Although defendant asserted that the indictment was fatally defective for failure to specify the contraband that defendant conspired to possess in a correctional facility, the two count indictment included the essential statutory elements of the charges against defendant and provided sufficient notice so that defendant suffered no prejudice in preparing a defense. Furthermore, defendant was procedurally barred from arguing an objection to a multi-count indictment on appeal because defendant failed to raise the objection at trial. Graham v. State, 204 So. 3d 329, 2016 Miss. App. LEXIS 113 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion by denying defendant's motion to sever the sexual battery count from the child exploitation count where both charges were based on the same act or transaction, namely defendant's sexual assault of the victim that he photographed. Moore v. State, 160 So. 3d 728, 2015 Miss. App. LEXIS 182 (Miss. Ct. App. 2015).

Trial court did not err in failing to sever the counts of the indictment, as the offenses were similar in type and all had the same motive, acquiring money, and the fact that the offense had different victims was not controlling Gunn v. State, 174 So. 3d 848, 2014 Miss. App. LEXIS 641 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 479 (Miss. 2015).

Although the indictment spanned approximately seven years, the trial court did not err in denying defendant's motion to sever, as the trial court used the proper legal standard and considered factors of similar conduct, the same victim, and the time period to find that defendant's acts constituted a common scheme or plan. Singleton v. State, 151 So. 3d 1046, 2014 Miss. App. LEXIS 678 (Miss. Ct. App. 2014).

Defendant's sentence was affirmed because the trial judge was well within his authority in Miss. Code Ann. § 99-19-21 to impose concurrent or consecutive sentences, and pursuant to Miss. Code Ann. § 99-7-2(3), the court could impose separate sentences for each of his sexual battery of a minor convictions under Miss. Code Ann. § 97-3-95(1)(d). Eason v. Epps, 32 So. 3d 538, 2009 Miss. App. LEXIS 723 (Miss. Ct. App. 2009).

Defendant's indictment included the relevant language from Miss. Code Ann. § 97-3-79 and the evidence clearly showed that the armed robbery crimes were based on the same act or transaction. Thus, there was no defect in the indictment under Miss. Code Ann. § 99-7-2(1). Thomas v. State, 14 So. 3d 812, 2009 Miss. App. LEXIS 520 (Miss. Ct. App. 2009).

Indictment charged defendant with one count of touching a child for lustful purposes pursuant to Miss. Code Ann. § 97-5-23(1) and one count of sexual battery pursuant to Miss. Code Ann. § 97-3-95(1)(d), and the crimes formed a common scheme of sexual misconduct and all the crimes occurred over a period of time against the same victim in a similar manner; thus, the court rejected defendant's claim that it was error for him to be tried on a multi-count indictment, for purposes of Miss. Code Ann. § 99-7-2, plus the court noted that the trial court instructed the jury to evaluate each count separately and return separate verdicts. Wilson v. State, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Because defendant did not raise the issue at trial that it was error for him to be tried on a multi-count indictment, defendant was procedurally barred from asserting the issue on appeal, but because the issue affected his substantial rights, the court reviewed the matter under the plain error doctrine. Wilson v. State, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

Denial of petitioner state death row inmate's motion for severance did not violate his Fifth Amendment rights because Miss. Code Ann. § 99-7-2 allowed for joinder of the four counts of capital murder and the state did not tie a weak case to a stronger one; the evidence against the inmate in each count was roughly the same and overwhelming, and it was not likely that four different juries would have returned different verdicts. Stevens v. Epps, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), aff'd, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Where defendant was charged with armed robbery, kidnapping, and possession of a firearm as a convicted felon and where the trial court denied defendant's motion to sever the latter charge, the trial court erred in not permitting defendant to stipulate to the prior conviction and permitting the State to present evidence regarding the conviction because evidence of the prior conviction was a necessary element of the crime for which defendant was on trial but evidence of the specific nature of the crime for which defendant was previously convicted was not an essential element of the crime for which defendant was on trial. Because the evidence of defendant's guilt was overwhelming, however, the error was harmless. Williams v. State, 991 So. 2d 593, 2008 Miss. LEXIS 399 (Miss. 2008).

Defendant's confession as to a possession of cocaine count did not materially prejudice his right to a fair trial on a sale or transfer of cocaine count because a jury was instructed to consider each count separately and substantial evidence supported defendant's conviction on the sale count. Armstead v. State, 978 So. 2d 642, 2008 Miss. LEXIS 169 (Miss. 2008).

Appellant's indictment was not grounds for post-conviction relief because appellant waived the argument when he entered his guilty plea and, while appellant claimed that the indictment was defective for failing to include the language of Miss. Code Ann. § 99-7-2(1), there was no defect in the indictment because (1) inclusion of the language found in § 99-7-2(1) was not necessary for the indictment to be valid; (2) the indictment tracked the language

Miss. Code Ann. § 41-29-139, which was the relevant statute for the crime of sale of a controlled substance; and (3) the indictment included the applicable statute number. Miller v. State, 973 So. 2d 319, 2008 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. dismissed, 981 So. 2d 298, 2008 Miss. LEXIS 218 (Miss. 2008).

Two rapes occurred only three hours apart, and clearly a span of only three hours between the two crimes was not a sufficient lapse of time to weigh in favor of severance; also, the rapes were interwoven because: (1) they occurred only three hours apart; (2) both of defendant's victims knew him personally; (3) he showed up at both victims' homes unannounced and told them that he just needed a place to sit down for a minute because his parents would not allow him into their home; (4) he asked both victims for a glass of water before he jumped them and raped them; and (5) he held a gun to their heads. Golden v. State, 968 So. 2d 378, 2007 Miss. LEXIS 530 (Miss. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate in part because the two murders that he was convicted of were interwoven; thus, the trial court did not abuse its discretion in its decision not to sever the counts. Turner v. State, 953 So. 2d 1063, 2007 Miss. LEXIS 2 (Miss. 2007).

Motion to sever was properly denied as to charges relating to church burglaries because they were part of a common scheme or plan, pursuant to Miss. Code Ann. § 99-7-2; however, drug and paraphernalia charges stemming from evidence found at defendant's residence during the execution of a search warrant were severed. Dimaio v. State, 951 So. 2d 581, 2006 Miss. App. LEXIS 782 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was proper where the sentencing order was appropriate pursuant to Miss. Code Ann. § 99-7-2 because the circuit court imposed separate sentences for each count of the indictment. Ramage v. State, 914 So. 2d 274, 2005 Miss. App. LEXIS 772 (Miss. Ct. App. 2005).

Common thread running through each of the counts was the gun. It was taken in the burglary, it was possessed, and it was sold, and each of the offenses were based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. It appeared that the scheme or plan was to commit a burglary and get items which could be sold illegally for cash. Severance of the counts was not warranted, and there was no impediment to trying count three (felon in possession of a firearm), with counts one (burglary of an inhabited dwelling) and two (sale of a stolen firearm), even though part of the necessary proof on count three would not have been admissible in counts one and two. Harris v. State, 908 So. 2d 868, 2005 Miss. App. LEXIS 530 (Miss. Ct. App. 2005).

Defendant's counsel was not ineffective for failing to request a severance of the two charges against defendant as the acts could be tried together under Miss. Code Ann. § 99-7-2 as defendant sold the same drug to the same undercover officer within 72 hours. Watkins v. State, 874 So. 2d 486, 2004 Miss. App. LEXIS 485 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion to sever counts of grand larceny and auto theft; where a pick-up truck was stolen on the same night that defendant was seen attempting to detach a trailer from a trailer hitch, the evidence showed a common scheme to obtain a pickup truck with which to steal equipment. Stone v. State, 867 So. 2d 1032, 2003 Miss. App. LEXIS 1026 (Miss. Ct. App. 2003).

In a case where defendant was convicted of two counts of lustful touching of a child and two counts of sexual battery, since the trial court properly held a hearing concerning severance and also made it known that the jury would be required to evaluate each count of the indictment individually, the trial court did not abuse its discretion when it denied the motion for severance. Broderick v. State, 878 So. 2d 103, 2003 Miss. App. LEXIS 855 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 937 (Miss. 2004).

The fact that there was a multicount indictment against the defendant that pertained to separate and distinct crimes did not mandate reversal where the defendant was tried on charges of armed robbery and burglary of an inhabited dwelling stemming from the same incident and the remaining charges in the indictment were severed prior to trial. Washington v. State, 800 So. 2d 1140, 2001 Miss. LEXIS 256 (Miss. 2001).

As the second of two armed robberies was part of common plan, and the first robbery had been completed just shortly before commission of the second began, the court did not err in refusing to sever the offenses. Williams v. State, 794 So. 2d 1019, 2001 Miss. LEXIS 236 (Miss. 2001).

A multi-count indictment was in compliance with this section, notwithstanding that all of the crimes involved different victims, since the defendant's crime spree constituted a "common scheme or plan" as contemplated in subsection 1(b); all of the events occurred over the brief period of seven hours in relatively close proximity to each other and all of the offenses were interrelated as they each involved assault and/or theft of property. Patrick v. State, 754 So. 2d 1194, 2000 Miss. LEXIS 49 (Miss. 2000).

There was no improper multiplicity or duplicity in an indictment that charged the defendant with four distinct and separate counts of embezzlement in Counts I - IV and one count of embezzlement that covered a time frame exclusive of the specific dates enumerated in Counts I - IV, but inclusive of the dates surrounding Counts II - IV. Taylor v. State, 754 So. 2d 598, 2000 Miss. App. LEXIS 25 (Miss. Ct. App. 2000).

The court properly allowed the joint trial of two counts for the sale of marijuana based on a common plan or scheme to sell marijuana to callers who paged him and met him at a specific location; a different result was not required by the fact that the second buy was not arranged until the first buy was completed or that the sales involved separate purchasers and occurred at separate times. Ott v. State, 722 So. 2d 576, 1998 Miss. LEXIS 522 (Miss. 1998).

OPINIONS OF THE ATTORNEY GENERAL

Where a person commits multiple acts of receiving more Temporary Assistance for Needy Families than that to which he or she is entitled, he or she may be tried in a single proceeding and separate sentences for each conviction may be imposed. Taylor, November 6, 1998, A.G. Op. #98-0665.

RESEARCH REFERENCES

ALR.

Additional peremptory challenges because of multiple criminal charges. 5 A.L.R.4th 533.

Joinder of offenses under Rule 8(a), Federal Rules of Criminal Procedure. 39 A.L.R. Fed. 479.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 196 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 91-102, (proceedings to quash, dismiss, or set aside accusatory pleading).

5 Am. Jur. Trials, §§ 12-20, (pretrial procedures and motions in criminal cases).

CJS.

42 C.J.S., Indictments and Informations §§ 215, 218 et seq.

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§ 99-7-3. Formal or technical words not necessary.

The words "force and arms" or the words "contrary to the form of the statute," or any other merely formal or technical words, shall not be necessary in an indictment if, without them, the offense be certainly and substantially described.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(65); 1857, ch. 64, art. 7; 1871, § 2884; 1880, § 3001; 1892, § 1351; 1906, § 1423; Hemingway's 1917, § 1179; 1930, § 1203; 1942, § 2446.

Cross References — Indictments for violation of liquor laws not being quashed for want of form or having negative exceptions, see § 99-7-29.

Necessity for formal or technical words in an indictment, see MRCrP 14.1.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular crimes.

1. In general.

The habitual offender portion of an indictment which was returned under § 99-19-83 was faulty in that it did not give the date of the judgment for a prior conviction and, therefore, the conviction should not have been allowed to be used in the habitual sentencing portion of the trial. Ormond v. State, 599 So. 2d 951, 1992 Miss. LEXIS 153 (Miss. 1992).

Defendants were sufficiently apprised of the offenses with which they were charged where the indictment cited and quoted relevant statutory language and provided a concise description of the essential facts pertaining to each offense. King v. State, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

The entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment, with only 2 exceptions; the principle exception to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived, and additionally, a guilty plea does not waive subject matter jurisdiction. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

The fact that a defendant could have been prosecuted under either of 2 statutes did not require the state to select the offense with the lesser penalty so long as the indictment made clear which statute the state did select for prosecution. Craig v. State, 520 So. 2d 487, 1988 Miss. LEXIS 44 (Miss. 1988).

An indictment which charges the commission of a crime in the language of a statute, or in words aptly describing the offense, is sufficient although it does not designate the statute. Pearson v. State, 248 Miss. 353, 158 So. 2d 710, 1963 Miss. LEXIS 401 (Miss. 1963).

An indictment must state name of victim of an offense where that is an element of the offense, and a failure to state or material variance between statement and proof of the name is fatal. Hughes v. State, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

Ordinarily, it is not necessary for an indictment which properly sets forth the commission of a crime in language that brings it within the provisions of a statute to refer specifically to the statute. Rogers v. State, 198 Miss. 495, 22 So. 2d 550, 1945 Miss. LEXIS 220 (Miss. 1945).

Omission of allegations in an indictment which go to the very essence of the offense attempted to be charged are not waived by defendant's failure to demur to the indictment. Rogers v. State, 198 Miss. 495, 22 So. 2d 550, 1945 Miss. LEXIS 220 (Miss. 1945).

Where the words of a statute defining a crime are so specific as to give notice of the act made unlawful and so exclusive as to prevent its application to other acts it is sufficient to charge a statutory crime in an indictment in the language of the statute. State v. Hinton, 139 Miss. 513, 104 So. 354, 1925 Miss. LEXIS 172 (Miss. 1925).

A clerical omission of an otherwise essential word in an indictment will not render the indictment void where the indictment sets out the nature and cause of the accusation. Smith v. State, 132 Miss. 521, 97 So. 4, 1923 Miss. LEXIS 87 (Miss. 1923).

The omission of the word "feloniously" from an indictment charging an offense in the language of the statute cannot be raised in the supreme court on appeal for the first time, where the indictment otherwise informs the accused of the nature and cause of the accusation against him. Patterson v. State, 127 Miss. 256, 90 So. 2, 1921 Miss. LEXIS 220 (Miss. 1921).

Statute applied and words "contrary to the form of the statute," held to be unnecessary. Smith v. State, 58 Miss. 867, 1881 Miss. LEXIS 55 (Miss. 1881).

The use of words substantially synonymous with those in the statute is sufficient. Harrington v. State, 54 Miss. 490, 1877 Miss. LEXIS 32 (Miss. 1877); Roberts v. State, 55 Miss. 421, 1877 Miss. LEXIS 152 (Miss. 1877).

While it is better and safer to follow approved precedents and to adhere closely and precisely to the statutory description of offenses, yet the indictment will be good if "the offense be certainly and substantially described." Kline v. State, 44 Miss. 317, 1870 Miss. LEXIS 114 (Miss. 1870).

The general rule is modified by the statute (Code 1906, § 1423 [Code 1942, § 2446]), so as to render unnecessary merely formal or technical words if, without them, the offense be certainly and substantially described. Kline v. State, 44 Miss. 317, 1870 Miss. LEXIS 114 (Miss. 1870).

Statutory indictments: When the enacting clause describes the offense with certain exceptions named therein, it is necessary to negative the exceptions, but where the exceptions are in separate clauses of the statute, they may be omitted from the indictment and the defendant must show that his case comes within them to avail himself of their benefit. Kline v. State, 44 Miss. 317, 1870 Miss. LEXIS 114 (Miss. 1870).

If there is in the language of the statute no sufficient words to define any offense, then the use of the exact and technical language of the statute alone is not sufficient, but in addition to the statutory language the full measure of the offense must be charged by the use of such words as are necessary and proper under established rules of law to characterize the crime. Jesse v. State, 28 Miss. 100, 1854 Miss. LEXIS 154 (Miss. 1854); Sarah v. State, 28 Miss. 267, 1854 Miss. LEXIS 172 (Miss. 1854); Harrington v. State, 54 Miss. 490, 1877 Miss. LEXIS 32 (Miss. 1877); Sullivan v. State, 67 Miss. 346, 7 So. 275, 1889 Miss. LEXIS 54 (Miss. 1889).

2. Particular crimes.

Indictment for sexual battery was insufficient where it failed to notify defendant that he was being charged with sexually penetrating victim without victim's consent; indictment did not include without consent in its charge. Peterson v. State, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

An indictment properly charged the defendant with simple assault under § 97-3-7, even though the indictment contained the word "feloniously" which does not appear in the statute. Reining v. State, 606 So. 2d 1098, 1992 Miss. LEXIS 542 (Miss. 1992).

An indictment charging a defendant with intentional murder and assigning a maximum penalty of life was sufficient to give the defendant fair notice of the crime charged, even though the jury instructions in the ensuing prosecution failed to include a charge that the murder was intentional. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

An indictment charging the defendant with rape under § 97-3-65 was proper, even though the indictment used the language "a female person under the age of 14," while the statute states, in pertinent part, "a child under the age of 14." The indictment's language was wholly included within the statutory language, since a female person under the age of 14 is a child under the age of 14; the indictment need not use the precise words of the statute. Furthermore, the defendant was not prejudiced in the preparation of his defense or exposed to double jeopardy by the indictment's language. Allman v. State, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

Surplus language contained in an indictment for rape under § 97-3-65(1) did not prejudice the defendant and was not improper where the indictment used the language "unlawfully, willfully and feloniously rape, ravish and carnally know." The term "unlawfully" appeared in both the indictment and the statute, the term "feloniously" means unlawfully with the intent to commit a felony-grade crime, "willfully" simply means voluntarily, and "ravish" means rape. Allman v. State, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

The State could properly proceed against a defendant under § 97-29-45(1)(c), which prohibits making a harassing telephone call, rather than under § 97-29-45(1)(e), which prohibits repeated harassing telephone calls, even though the defendant allegedly made 7 harassing telephone calls to a single individual, so long as the indictment was clear and unequivocal. Gray v. State, 549 So. 2d 1316, 1989 Miss. LEXIS 436 (Miss. 1989).

Under the constitutions of both the United States and the State of Mississippi and under § 99-19-5, a jury instruction on child fondling should not have been given where the indictment charged only forcible rape since child fondling is not a necessarily included offense of forcible rape and, therefore, the indictment did not sufficiently notify the defendant that he might face a charge of child fondling. Hailey v. State, 537 So. 2d 411, 1988 Miss. LEXIS 632 (Miss. 1988).

It is not necessary that an indictment charging conspiracy include the penalty sections of the code applicable to the underlying crime in order to trigger the conspiracy provisions of § 97-1-1, and to properly charge a felony. Gardner v. State, 531 So. 2d 805, 1988 Miss. LEXIS 481 (Miss. 1988).

An indictment was sufficient to notify the defendant that he had been charged with rape where it alleged that he made a lewd suggestion combined with a physical act (the placing of a towel over the victim's face), which was an overt act sufficient for the ultimate commission of a rape. Alexander v. State, 520 So. 2d 127, 1988 Miss. LEXIS 53 (Miss. 1988).

An indictment under the wording of the statute making it unlawful for the holder of a permit for the sale of beer or wine at retail to sell, give or furnish any beer or wine to a person under the age of 18 years, was not defective for failing to charge the defendant with knowing that his employee sold or gave beer to a minor, where the statute itself does not use the word "knowing" and where the indictment was based upon an affidavit so worded as to show that the defendant knew of his employee's activities in selling beer to a minor. State v. Labella, 232 So. 2d 354, 1970 Miss. LEXIS 1620 (Miss. 1970).

An indictment charging the holder of a permit for the sale of beer and wine at retail with selling, giving or furnishing beer to a person under 18 years of age, was not defective in failing to charge the defendant with knowledge that his employee sold or gave beer to the minor, since the defendant's lack of knowledge of the acts of his employee was a defense and a question of fact for submission to the jury, and neither matters of evidence nor matters of defense need by averred in an indictment or information. State v. Labella, 232 So. 2d 354, 1970 Miss. LEXIS 1620 (Miss. 1970).

Where an indictment charged that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to Code 1942, § 2220, and against the peace and dignity of the State of Mississippi, the indictment adequately charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. Dendy v. State, 224 Miss. 208, 79 So. 2d 827, 1955 Miss. LEXIS 481 (Miss. 1955).

In a prosecution for rape where the indictment charged that prosecuting witness was a female of the age of 12 years or more, the failure of the indictment to allege that the prosecutrix was a child or a person or a human being did not constitute a fatal defect in the indictment. Gillespie v. State, 215 Miss. 380, 61 So. 2d 150, 1952 Miss. LEXIS 577 (Miss. 1952).

Insufficiency of bigamy indictment may be raised for first time on appeal when indictment is fatally defective for failure to set forth time, place and circumstance of former marriage, or name of person with whom former marriage is alleged to have been contracted. Wash v. State, 206 Miss. 858, 41 So. 2d 29, 1949 Miss. LEXIS 307 (Miss. 1949).

An indictment for grand larceny containing an incongruous description of the cow allegedly stolen if defective should have been availed of by demurrer and such defect could not be raised for first time on appeal. Clark v. State, 39 So. 2d 783 (Miss. 1949).

RESEARCH REFERENCES

ALR.

Use of abbreviation in indictment or information. 92 A.L.R.3d 494.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 115 et seq.

CJS.

42 C.J.S., Indictments and Informations §§ 176 et seq.

§ 99-7-5. Allegations of time; want of perfect venue.

An indictment for any offense shall not be insufficient for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for the want of a proper or perfect venue.

HISTORY: Codes, 1857, ch. 64, art. 266; 1871, § 2803; 1880, § 3013; 1892, § 1356; 1906, § 1428; Hemingway's 1917, § 1184; 1930, § 1208; 1942, § 2451.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Time, generally.
3. —Amendment.
4. Venue.

1. In general.

Variance in the indictment and the proof was one of form only; it did not prejudice defendant's defense, or his theory of the case. Leonard v. State, 972 So. 2d 24, 2008 Miss. App. LEXIS 16 (Miss. Ct. App. 2008).

In defendant's prosecution for wire fraud, a change of date in the indictment did not rise to a level of prejudice to defendant. Mississippi law forgives indictments that are flawed for "stating the time imperfectly" of an offense, where the timing of such is not an essential element of the charge. McGee v. State, 853 So. 2d 125, 2003 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

An indictment should state some time and place where the offense was committed; otherwise it is demurrable. State v. Glennen, 93 Miss. 836, 47 So. 550, 1908 Miss. LEXIS 154 (Miss. 1908).

2. Time, generally.

Defendant's conviction for fondling a child under the age of 18 was appropriate because his indictment sufficiently apprised him of all of the charges against him. Further, there was nothing indicating that time was an essential element of the offense, and there was nothing in the record that indicated that defendant planned to assert a time-sensitive defense, such as an alibi. Sellars v. Walgreen Co., 971 So. 2d 1278, 2008 Miss. App. LEXIS 3 (Miss. Ct. App. 2008).

Fact that a traffic ticket issued in a DUI case had a scrivener's error regarding the date of offense did not render it ineffective under Miss. Unif. Cir. & County Ct. Prac. R. 7.06 because defendant was put on notice of the date of the offense by the fact that the date was correct on the other two citations he was issued. Scott v. City of Booneville, 962 So. 2d 698, 2007 Miss. App. LEXIS 185 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 637 (Miss. 2007).

Defendant's conviction for sexual battery was affirmed; while the indictment did not identify singular dates as to when the incidents of sexual battery occurred, the indictment was not insufficient under Miss. Code Ann. § 99-7-5 because the indictment adequately prepared defendant and allowed him to prepare any possible defense. Allred v. State, 908 So. 2d 889, 2005 Miss. App. LEXIS 549 (Miss. Ct. App. 2005).

Defendant's indictment accused him of two counts of sexual battery against one child; the wording of the counts was identical, but the evidence and jury instruction conference indicated that the two counts were based upon defendant's confession of two separate incidents of sexual contact with the victim. Because there was nothing to indicate that time was an essential element of the offense, and defendant made no mention of an alibi defense, defendant was fully and fairly advised of the charges against him. Baker v. State, 930 So. 2d 399, 2005 Miss. App. LEXIS 447 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

Defendant's conviction for sexual battery was affirmed; while the indictment did not identify singular dates as to when the incidents of sexual battery occurred, the indictment was not insufficient under Miss. Code Ann. § 99-7-5 because the indictment adequately prepared defendant and allowed him to prepare any possible defense. Allred v. State, 908 So. 2d 889, 2005 Miss. App. LEXIS 549 (Miss. Ct. App. 2005).

In an aggravated assault case, defendant was not prejudiced by the lack of specificity in the listing of the date of the offenses charged in the indictment, as a change in the date of the offenses did not affect the viability of defendant's defense, as the date was not the essence of the crimes and was, therefore, amendable and not fatal. Davis v. State, 866 So. 2d 1107, 2003 Miss. App. LEXIS 900 (Miss. Ct. App. 2003).

In a prosecution for sexual battery of a child under the age of 14, the court properly denied a motion to compel the state to declare with more certainty exactly when the alleged offenses occurred; given the limited intellectual abilities of the victim, it would have been impossible for the state to prove the exact date of the offense with any more precision than had already been demonstrated. Little v. State, 744 So. 2d 339, 1999 Miss. App. LEXIS 314 (Miss. Ct. App. 1999).

An indictment charging a defendant with committing sexual battery "on or about" a certain date was specific enough to put the defendant on notice of the charge against him and the approximate date the crime took place, though the evidence presented at trial indicated that the sexual battery occurred 4 days after the date set forth in the indictment. Daniel v. State, 536 So. 2d 1319, 1988 Miss. LEXIS 611 (Miss. 1988).

An indictment charging escape from jail was not insufficient though it charged that the escape occurred one day before the date the escape actually took place. Corley v. State, 536 So. 2d 1314, 1988 Miss. LEXIS 613 (Miss. 1988).

Evidence of prior molestation of child was admissible because in context of sexual crimes, relaxation of rule that prosecution cannot offer evidence of criminal conduct not charged in indictment of which accused has not been convicted has long been recognized; substantially similar prior sexual acts with same person, that is, sexual acts of same general type as those charged in indictment, are as matter of common sense probative of issue being tried. Wilson v. State, 515 So. 2d 1181, 1987 Miss. LEXIS 2926 (Miss. 1987).

An indictment incorrectly charging that the grand larceny was committed on November 14, 1968, while the evidence showed that it was actually committed on August 16, was not insufficient where the defendant was not surprised or prejudiced by testimony that the offense occurred on August 16, and in fact offered testimony of alibi for both dates. Deaton v. State, 242 So. 2d 452, 1970 Miss. LEXIS 1385 (Miss. 1970).

In a prosecution on a charge of assault and battery with a stick, time was not of the essence and an indictment was sufficient, notwithstanding the failure to allege the day of the month on which the crime was committed. Moffett v. State, 223 Miss. 276, 78 So. 2d 142, 1955 Miss. LEXIS 378 (Miss. 1955).

An indictment is not defective because it does not state definitely the time at which the offense was committed. Washington v. State, 222 Miss. 782, 77 So. 2d 260, 1955 Miss. LEXIS 663 (Miss. 1955).

Indictment for embezzlement under Code 1942, § 2118, which alleges that embezzlement was committed on November 17, 1948, when in fact indictment was returned on that date, is not invalid for not stating date alleged crime was committed. State v. May, 208 Miss. 862, 45 So. 2d 728, 1950 Miss. LEXIS 306 (Miss. 1950).

In prosecution for trespass, state was not required to prove commission of offense on date alleged in affidavit, but could prove commission on any date within two years prior to indictment. Card v. State, 182 Miss. 229, 181 So. 524, 1938 Miss. LEXIS 176 (Miss. 1938).

Refusal of instruction which in effect would require the state to prove commission of offense on date alleged in affidavit held not reversible. Card v. State, 182 Miss. 229, 181 So. 524, 1938 Miss. LEXIS 176 (Miss. 1938).

Proof of possession of liquor, subsequent to date charged in the indictment for possession, held competent. Smith v. State, 144 Miss. 872, 110 So. 690, 1926 Miss. LEXIS 424 (Miss. 1926).

Ordinarily, date of commission of offense need not be alleged, but on demurrer to indictment facts alleged therein, including date, must be assumed as true. State v. Clark, 145 Miss. 207, 110 So. 447, 1926 Miss. LEXIS 15 (Miss. 1926).

An allegation as to the time of the commission of embezzlement held to be sufficient. State v. Yeates, 140 Miss. 224, 105 So. 498, 1925 Miss. LEXIS 253 (Miss. 1925).

Under a charge of unlawful cohabitation proof of acts within two years before indictment is permissible. State v. Meyer, 135 Miss. 878, 101 So. 349, 1924 Miss. LEXIS 84 (Miss. 1924).

Where the indictment charged the offense to have been committed Jan. 23, 1922, evidence may be admitted of the commission of the said crime at any time two years prior to the finding of the indictment, where the two-years statute of limitations barred the offense. Kolb v. State, 129 Miss. 834, 93 So. 358, 1922 Miss. LEXIS 97 (Miss. 1922).

In a prosecution for the unlawful sale of liquor, the state relied on a sale at a different time from that laid in the indictment. This entitled the accused to a continuance on timely application and proper showing; but on his failure to make such application he has waived his right after verdict. Peebles v. State, 105 Miss. 834, 63 So. 271, 1913 Miss. LEXIS 266 (Miss. 1913).

Evidence of the sale of liquor after date laid in the indictment warrants a conviction. Oliver v. State, 101 Miss. 382, 58 So. 6, 1912 Miss. LEXIS 5 (Miss. 1912).

3. —Amendment.

In defendant's prosecution for wire fraud, a change of date in the indictment did not rise to a level of prejudice to defendant. Mississippi law forgives indictments that are flawed for "stating the time imperfectly" of an offense, where the timing of such is not an essential element of the charge. McGee v. State, 853 So. 2d 125, 2003 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

In a prosecution for illegal distribution of a controlled substance, time is not an essential element and, therefore, an amendment of the indictment to change the date on which the offense occurred is one of form only. Martin v. State, 724 So. 2d 420, 1998 Miss. App. LEXIS 974 (Miss. Ct. App. 1998).

In a prosecution for rape, the court properly allowed the amendment of the indictment with respect to the date of the rape where the victim's statement to the police, which contained the amended date, was admitted into evidence without objection and, assumedly, had been provided to the defendant. Levy v. State, 724 So. 2d 405, 1998 Miss. App. LEXIS 957 (Miss. Ct. App. 1998).

The state was permitted to amend an indictment charging sale of cocaine to change the date of the alleged sale, even though the jury had already been selected and impaneled, where the defendant's alibi defense and supporting witnesses were applicable for both dates. Doby v. State, 532 So. 2d 584, 1988 Miss. LEXIS 500 (Miss. 1988).

In a prosecution for aggravated assault upon a police officer, the trial court properly allowed the amendment of the indictment which contained an incorrect date of the crime where there was no proof of surprise or prejudice to the defendant as a result of the discrepancy. Norman v. State, 385 So. 2d 1298, 1980 Miss. LEXIS 2008 (Miss. 1980).

Where 2 dates appear in an affidavit or an indictment, one of which is impossible and apparently a clerical error, the indictment is not invalid but may be amended. Torrence v. State, 283 So. 2d 595, 1973 Miss. LEXIS 1232 (Miss. 1973).

Where an indictment, charging a father with neglect to provide for the support and maintenance of his children failed to state the year in which the offense was committed, and where a demurrer was interposed, it was not error for the court to permit an amendment so as to state the year and overrule the demurrer. Archer v. State, 214 Miss. 742, 59 So. 2d 339, 1952 Miss. LEXIS 515 (Miss. 1952).

4. Venue.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351, 2011 Miss. App. LEXIS 364 (Miss. Ct. App. 2011).

Defendant attempted to draw a distinction between an indictment that completely omitted any reference to venue and one that had an improper or imperfect statement of the venue of the crime as set out in Miss. Code Ann. § 99-7-5; an omission of any reference to venue was encompassed within the meaning of the phrase "imperfect statement" found in the applicable statute. Garner v. State, 856 So. 2d 729, 2003 Miss. App. LEXIS 936 (Miss. Ct. App. 2003).

An indictment must give defendant notice of the place where the offense is alleged to have been committed by properly charging venue. Evans v. State, 144 Miss. 1, 108 So. 725, 1926 Miss. LEXIS 334 (Miss. 1926).

An indictment for grand larceny in a county composed of two judicial districts, which simply stated the crime was committed in the county without designating the district does not charge venue of the crime as required by constitution. Evans

v. State, 144 Miss. 1, 108 So. 725, 1926 Miss. LEXIS 334 (Miss. 1926).

But under this section [Code 1942, § 2451] an indictment may be amended by order of the court so as to charge venue properly. Evans v. State, 144 Miss. 1, 108 So. 725, 1926 Miss. LEXIS 334 (Miss. 1926).

The affidavit should state venue. Jones v. State, 133 Miss. 801, 98 So. 342, 1923 Miss. LEXIS 193 (Miss. 1923).

An instance where the venue is imperfectly stated. Smith v. Corporation of Oxford, 91 Miss. 651, 45 So. 365, 1907 Miss. LEXIS 176 (Miss. 1907).

RESEARCH REFERENCES

Am. Jur.
41 Am. Jur. 2d, Indictments and Informations §§ 128 et seq., 139 et seq.

CJS.
42 C.J.S., Indictments and Informations §§ 167-172.

§ 99-7-7. How instruments pleaded.

Whenever it shall be necessary to make an averment in an indictment as to any instrument, whether the same consists wholly or in part in writing, print, figures, or characters, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile of the whole or any part thereof.

HISTORY: Codes, 1857, ch. 64, art. 264; 1871, § 2801; 1880, § 3015; 1892, § 1358; 1906, § 1430; Hemingway's 1917, § 1186; 1930, § 1210; 1942, § 2453.

Cross References — Form of the indictment, see Miss. Unif. Cir. & Ct. Prac. R. 7.06.

JUDICIAL DECISIONS

1. In general.

When the false pretense charged in an indictment is in writing, the writing need not be set out in specific words, but it is sufficient to set out the purport thereof, unless some question turns on the form or construction of the instrument or some other legal description is given in the indictments, the accuracy of which may be material for the court to determine. Prisock v. State, 244 Miss. 408, 141 So. 2d 711, 1962 Miss. LEXIS 463 (Miss. 1962).

In an indictment charging the accused with the crime of attempting to commit false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, a statement that certain named individuals involved in the scheme bought insurance contracts to indemnify themselves from loss occasioned by personal injuries received in automobile accidents, and that another person, also involved, had bought an insurance contract of indemnity for loss occasioned by acts of negligence committed by him in the operation of the automobiles, sufficiently described the insurance policies by designation and type and thereby indicated their purport within the meaning of this section [Code 1942, § 2453]. Prisock v. State, 244 Miss. 408, 141 So. 2d 711, 1962 Miss. LEXIS 463 (Miss. 1962).

This section [Code 1942, § 2453] does not dispense with such certainty of description as will clearly identify the offense. An example furnished of insufficient averment. Roberts v. State, 72 Miss. 110, 16 So. 233, 1894 Miss. LEXIS 69 (Miss. 1894).

RESEARCH REFERENCES

Am. Jur.
41 Am. Jur. 2d, Indictments and Informations §§ 112 et seq.

CJS.
42 C.J.S., Indictments and Informations §§ 191-195.

Lawyers' Edition.
State regulation of judicial proceedings as violating commerce clause (Art I, § 8, cl 3) of Federal Constitution – Supreme Court cases. 100 L. Ed. 2d 1049.

§ 99-7-9. Presentment; entry on minutes of court; warrant to issue; copy of indictment to be served on defendant; informing victim as to status of charge.

All indictments and the report of the grand jury must be presented to the clerk of the circuit court by the foreman of the grand jury or by a member of such jury designated by the foreman, with the foreman's name endorsed thereon, accompanied by his affidavit that all indictments were concurred in by twelve (12) or more members of the jury and that at least fifteen (15) were present during all deliberations, and must be marked "filed," and such entry be dated and signed by the clerk. It shall not be required that the body of the grand jury be present and the roll called. An entry on the minutes of the court of the finding or presenting of an indictment shall not be necessary or made, but the endorsement by the foreman, together with the marking, dating, and signing by the clerk shall be the legal evidence of the finding and presenting to the court of the indictment. Unless the party indicted be in custody or on bond or recognizance entry of the indictment otherwise than by its number shall not be made at any time or for any purpose on the minutes or on any docket, nor shall any publicity be given to the fact of the existence of the indictment; but it shall never be made an objection to the indictment that it was improperly entered on the minutes or docket. A warrant for the person indicted shall immediately issue and be served on the person so indicted. After the arrest of the person indicted, and prior to arraignment, a copy of the indictment shall be served on such person.

Nothing contained herein, however, shall be construed to prohibit a prosecutor with knowledge of the status of a criminal charge from informing the victim, or, if the victim be deceased, a member of the immediate family of the victim, named in an indictment or in an application for an indictment as to the status of said charge at any time, consistent with established rules of court.

HISTORY: Codes, 1857, ch. 64, art. 257; 1871, § 2794; 1880, § 3006; 1892, § 1346; 1906, § 1418; Hemingway's 1917, § 1174; 1930, § 1198; 1942, § 2441; Laws, 1964, ch. 354; Laws, 1977, ch. 307; Laws, 1991, ch. 421, § 1; Laws, 2008, ch. 397, § 1, eff from and after July 1, 2008.

Cross References — Severance of joint indictments, see §§ 99-15-47, 99-15-49.

Inapplicability of Mississippi Rules of Evidence to proceedings before grand juries, see Miss. R. Evid. Rule 1101.

Grand jury's power to accuse a person by name of an offense in absence of an indictment, see MRCrP 13.6.

Docket management, see MRCrP 2.1.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Correction of clerical error.
3. Indorsement or signing of indictment.
4. Filing of indictment.
5. Service on defendant.
6. Affidavit of foreman.
7. Waiver of defects.

1. In general.

Defendant offered no evidence to show unfair surprise or that the amendment to the indictment prejudiced his ability to defend the case; defendant did not contest or dispute the prior charges against him. Wynn v. State, 964 So. 2d 1196, 2007 Miss. App. LEXIS 592 (Miss. Ct. App. 2007).

In a prosecution for burglary, the trial court did not err in overruling defendants' demurrer to the complaint for failure to attach a sworn and subscribed affidavit thereto, as required by this section. Usry v. State, 378 So. 2d 635, 1979 Miss. LEXIS 2540 (Miss. 1979).

The purpose and intent of the legislature in amending this section was to do away with the necessity of having at least 12 members of the grand jury, including the foreman, physically present when each and every indictment was returned to the court by providing an easier method, i.e., affidavits, by which the results of deliberations could be made known to the court. Thus, in a prosecution for selling marijuana, the trial court correctly overruled a demurrer to the indictment, even though the indictment was not accompanied by the foreman's affidavit, where the entire grand jury was before the court and filed the indictment, thus showing full compliance with the old, more laborious method of presenting indictments, and where there was no proof whatsoever of prejudice to defendant. McCormick v. State, 377 So. 2d 1070, 1979 Miss. LEXIS 2551 (Miss. 1979).

A motion to quash an indictment could not be granted on the ground that only hearsay evidence was presented to the grand jury, since the court will not go beyond an indictment and inquire into evidence considered by the grand jury to determine whether the evidence was in whole or in part hearsay. Case v. State, 220 So. 2d 289, 1969 Miss. LEXIS 1447 (Miss. 1969).

Where an indictment was lost and the accused made no objection to going to trial on a mere purported copy of the original indictment without the same being certified to, the omission of the clerk to certify the copy was an amendable defect which was waived by the failure of the accused to object. Grimsley v. State, 215 Miss. 43, 60 So. 2d 509, 1952 Miss. LEXIS 535 (Miss. 1952).

Burden is upon accused, moving to quash indictment duly signed, presented and filed, to prove twelve grand jurors did not concur, and that district attorney was in grand jury room; affidavits are not sufficient. Temple v. State, 165 Miss. 798, 145 So. 749, 1933 Miss. LEXIS 276 (Miss. 1933).

2. Correction of clerical error.

In a prosecution for armed robbery, the trial court properly overruled the defendant's demurrer to the indictment where the defect in the indictment was the omission of the words "21" and "January" from the line beginning with the word "Filed", which omission was later cured with the permission of the court and did not prejudice the defendant in any way. Smith v. State, 394 So. 2d 1340, 1981 Miss. LEXIS 1961 (Miss. 1981).

Order of court entered on minutes is unnecessary to authorize clerk to correct manifest error or omission in filing of indictment. Fairley v. State, 163 Miss. 682, 138 So. 330, 1931 Miss. LEXIS 5 (Miss. 1931).

Clerk, at same term at which indictment was returned, lawfully corrected manifest clerical error in date of filing indictment given as July 6, 1921, instead of 1931. Fairley v. State, 163 Miss. 682, 138 So. 330, 1931 Miss. LEXIS 5 (Miss. 1931).

3. Indorsement or signing of indictment.

Although defendant, who was convicted of statutory rape, asserted that his indictment lacked the grand-jury foreman's signature and was not marked "filed," with the entry signed and dated by the circuit-court clerk, the appellate court found that these alleged defects in the indictment were nonjurisdictional. Johnson v. State, 196 So. 3d 1118, 2016 Miss. App. LEXIS 475 (Miss. Ct. App. 2016).

Trial court properly denied defendant's motion for postconviction relief after defendant pled guilty in two cases to the sale of cocaine because the statutory requirements for presentation of an indictment were met; the indictments were complete with signatures by the grand jury foreman and the signature and date "filed and recorded" by the trial court clerk. Hunt v. State, 11 So. 3d 764, 2009 Miss. App. LEXIS 322 (Miss. Ct. App. 2009).

Defendant's indictment met the requirements of Miss. Unif. Cir. & County Ct. Prac. R. 7.06 where, under Miss. Code Ann. § 99-7-9, the endorsement by the foreman, together with the marking, dating, and signing by the clerks shall be the legal evidence of the finding and presenting to the court of the indictment; defendant's indictment was endorsed by the grand jury foreman; it was also marked "filed," dated, and signed by the clerk of the circuit court, and as such, his indictment was free from jurisdictional defects. Watts v. State, 981 So. 2d 1034, 2008 Miss. App. LEXIS 272 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to two counts of sexual battery, his lawyer was not deficient because he allowed appellant to plead guilty to a faulty indictment which allegedly did not meet the requirements of Miss. Code Ann. § 99-7-9 and Miss. Unif. Cir. & County Ct. Prac. R. 7.06. The indictments charging defendant with committing sexual battery bore a signature of the grand jury foreman and each was stamped filed on October 20, 2005, by the circuit clerk; three unsigned and unfiled indictments in the case were not cause to grant appellant relief on his ineffective assistance of counsel claim. Kimble v. State, 983 So. 2d 1069, 2008 Miss. App. LEXIS 116 (Miss. Ct. App. 2008).

Defendant's conviction and sentence for possession of more than one kilogram of marijuana with intent to distribute were both proper where the evidence met the totality of the circumstances test, including the drug dog's alerting to the package; further, her argument that the indictment was invalid because the foreman failed to sign it was improper because she raised the argument for the first time on appeal. Arguelles v. State, 867 So. 2d 1036, 2003 Miss. App. LEXIS 1081 (Miss. Ct. App. 2003).

Allegations that indictments were defective because the record did not identify them as the indictments returned by the appropriate grand jury and because they were not accompanied by the affidavit of the grand jury foreman, involved nonjurisdictional defects which were waived when the defendant entered a voluntary guilty plea and failed to timely assert his claims in the lower court. Moreover, it was not clear that the defendant would have been entitled to relief even if the claims had been timely asserted because the indictments were signed by the foreman of the grand jury and marked "filed" by the county circuit clerk. Brooks v. State, 573 So. 2d 1350, 1990 Miss. LEXIS 776 (Miss. 1990).

In a prosecution for burglary, the trial court properly overruled defendant's demurrer to the indictment, even though the indictment did not contain an affidavit that it was concurred in by 12 or more members of the grand jury and that 15 had been present during deliberations, where the indictment was presented to the court in accord with common law procedure, in that all members of the grand jury were present at the time of their report to the court, and where the indictment showed on its face that it was endorsed by the foreman, dated, signed and marked filed by the circuit clerk. Stewart v. State, 377 So. 2d 1067, 1979 Miss. LEXIS 2550 (Miss. 1979).

Defects in an indictment which was not marked "filed" and was not signed and dated by the circuit clerk, as required by this section, were procedural in nature and, unless raised by special demurrer, were waived and could not be raised for the first time on appeal. Jones v. State,

356 So. 2d 1182, 1978 Miss. LEXIS 2479 (Miss. 1978).

The names of the state's witnesses need not be endorsed on an indictment for burglary. Kelly v. State, 239 Miss. 683, 124 So. 2d 840, 1960 Miss. LEXIS 341 (Miss. 1960).

An indorsement in back of an indictment of a person whom the record showed was duly appointed and sworn as foreman of the jury was sufficient compliance with the section [Code 1942, § 2441]. Moffett v. State, 223 Miss. 276, 78 So. 2d 142, 1955 Miss. LEXIS 378 (Miss. 1955).

Where an indictment was signed by the county attorney, it was not necessary for the district attorney to sign the indictment and it was sufficient for the indictment to be returned in court by the grand jury as provided by this section [Code 1942, § 2441]. Watson v. State, 212 Miss. 788, 55 So. 2d 441, 1951 Miss. LEXIS 513 (Miss. 1951).

Objection that foreman of grand jury did not indorse name on indictment could not be raised for first time on appeal. Pruitt v. State, 163 Miss. 47, 139 So. 861, 1932 Miss. LEXIS 16 (Miss. 1932).

The complaint that an indictment was not sufficiently identified because of absence of clerk's filing indorsement could not be raised for first time on appeal. Wooten v. State, 155 Miss. 726, 125 So. 103, 1929 Miss. LEXIS 349 (Miss. 1929).

Claimed defect in indictment as not properly signed can only be reached on motion to quash and is not available for first time on appeal. Wilcher v. State, 152 Miss. 13, 118 So. 356, 1928 Miss. LEXIS 207 (Miss. 1928).

The foreman of the grand jury is not required to endorse his name on the dotted line on an indictment, but an endorsement at some other place will be sufficient. Dawsey v. State, 144 Miss. 452, 110 So. 239, 1926 Miss. LEXIS 397 (Miss. 1926).

4. Filing of indictment.

Although defendant's indictment was defective in that the circuit clerk had failed to stamp the indictment "filed," the error was procedural only and did not overcome the three-year time bar for filing for post-conviction relief. Cochran v. State, 969 So. 2d 119, 2007 Miss. App. LEXIS 476 (Miss. Ct. App. 2007).

Dating, signing, and filing of indictment by clerk need not be done in presence of grand jury. Fairley v. State, 163 Miss. 682, 138 So. 330, 1931 Miss. LEXIS 5 (Miss. 1931).

After conviction the accused cannot for the first time make the point that the indictment was not filed until after the argument was begun. Washington v. State, 78 Miss. 189, 28 So. 850, 1900 Miss. LEXIS 107 (Miss. 1900).

The filing of an indictment, the dating of it and signing of the entry by the circuit clerk is the exclusive evidence of its finding and presentation by the grand jury to the court. Stanford v. State, 76 Miss. 257, 24 So. 536, 1898 Miss. LEXIS 94 (Miss. 1898).

An indictment not so "filed" is invalid, that is, a trial cannot be had on it. Williamson v. State, 64 Miss. 229, 1 So. 171, 1886 Miss. LEXIS 50 (Miss. 1886).

The indorsement of the word "filed" on the indictment and the date signed by the clerk is the evidence of the finding and return. Smith v. State, 58 Miss. 867, 1881 Miss. LEXIS 55 (Miss. 1881); Cooper v. State, 59 Miss. 267, 1881 Miss. LEXIS 116 (Miss. 1881); Holland v. State, 60 Miss. 939, 1883 Miss. LEXIS 41 (Miss. 1883); Lea v. State, 64 Miss. 294, 1 So. 244, 1886 Miss. LEXIS 59 (Miss. 1886).

5. Service on defendant.

Record did not support defendant's assertions that he never received personal service of a copy of his indictment; his attorney received service of the indictment on defendant's behalf, defendant admitted that the clerk sent him a copy of his indictment after he requested one, and his indictment was read to him in open court before entering his plea. Parks v. State, 228 So. 3d 853, 2017 Miss. App. LEXIS 58 (Miss. Ct. App.), cert. denied, 220 So. 3d 977, 2017 Miss. LEXIS 262 (Miss. 2017).

In defendant's auto burglary case, the indictment was properly served because defendant was already in possession of a copy of the indictment at the time his counsel moved to dismiss for improper service, at the hearing the circuit court judge stated that he wanted the lack of proper service to be cured, and defendant was re-served with the second indictment by the assistant district attorney and in the presence of the trial judge and his defense counsel. Qualls v. State, 947 So. 2d 365, 2007 Miss. App. LEXIS 21 (Miss. Ct. App. 2007).

The delivery of a copy of an indictment to an accused in compliance with Code 1942 § 2441, is mandatory. Yarbrough v. Dowell Div. of Dow Chemical Co., 285 So. 2d 170, 1973 Miss. LEXIS 1281 (Miss. 1973).

Defendant waived the requirements of Code 1942 § 2441, by voluntarily waiving a reading of the indictment without having made an objection to having been arraigned prior to receiving a copy of the indictment, although such is not necessarily so in capital cases. Yarbrough v. Dowell Div. of Dow Chemical Co., 285 So. 2d 170, 1973 Miss. LEXIS 1281 (Miss. 1973).

Although this section [Code 1942, § 2441] is mandatory in its requirements, a conviction would not be reversed on the ground that the state failed to serve a copy of the indictment on the defendant as required by the section, where the matter was not raised in the trial court and the record did not affirmatively show that the indictment was not served on the defendant. Hall v. State, 220 So. 2d 279, 1969 Miss. LEXIS 1442 (Miss. 1969).

Where the matter was not raised in the trial court and the record does not show that a copy of the indictment was not served on the defendant, the presumption is that the provisions of this section [Code 1942, § 2441] in that respect had been complied with. Hall v. State, 220 So. 2d 279, 1969 Miss. LEXIS 1442 (Miss. 1969).

Where the record is silent as to whether a copy of the indictment was in fact presented to the defendant prior to his arraignment, the supreme court will indulge the presumption that the judge and officers of the court have done their duty in the absence of authoritative evidence to the contrary. Ford v. State, 218 So. 2d 731, 1969 Miss. LEXIS 1616 (Miss. 1969).

This section [Code 1942, § 2441] does not provide for any certain length of time between the serving of the copy of an indictment and the arraignment of the defendant, and in the absence of evidence that the defendant was prejudiced by the state's failure to serve a copy upon him sooner, it was not error to refuse to grant a continuance on this basis. State v. Pearson, 185 So. 2d 677, 1966 Miss. LEXIS 1530 (Miss. 1966).

6. Affidavit of foreman.

An indictment is not rendered defective because it is not accompanied by an affidavit of the foreman of the grand jury; the legal evidence of the concurrence of 12 or more of the grand jurors in finding and presenting the indictment is fully established by the signing thereof on the part of the foreman and the marking of it as "filed" by the clerk of the court. Morris v. State, 767 So. 2d 255, 2000 Miss. App. LEXIS 275 (Miss. Ct. App. 2000), overruled in part, Edwards v. Booker, 796 So. 2d 991, 2001 Miss. LEXIS 185 (Miss. 2001).

This section in its present form only requires an affidavit attesting that all indictments then being returned meet the requirement that 15 members were present at the deliberations and that at least 12 concurred in the indictment, and does not require formal execution of the affidavit; thus, in a prosecution for armed robbery, the trial court did not err in overruling defendant's demurrer to the indictment, even though the foreman of the grand jury had failed to complete the affidavit on the back of the indictment, where the trial court announced that the record was to show that all grand jurors were in the courtroom for the presentation of the indictment, and where no prejudice resulted from the failure to complete the affidavit. If the affidavit was omitted, such omission not appearing on the face of the indictment, the omission might be subject to a motion to quash pursuant to § 99-7-23. Jackson v. State, 377 So. 2d 1060, 1979 Miss. LEXIS 2548 (Miss. 1979).

7. Waiver of defects.

Where appellant was convicted on a plea of guilty to selling methamphetamine, appellant failed to show the plea was invalid based on an invalid indictment, as appellant's indictment was signed by the foreman of the grand jury, stamped "filed," and marked, dated, and signed by the clerk; by entering a valid guilty plea, appellant waived all non-jurisdictional defects in the indictment and failed to allege any prejudice resulted due to the alleged defects in the indictment. Carroll v. State, 963 So. 2d 44, 2007 Miss. App. LEXIS 532 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

ALR.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 A.L.R.4th 429.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 25 et seq., 65, 76 et seq.

CJS.

42 C.J.S., Indictments and Informations §§ 22 et seq., 87.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

§ 99-7-11. Concurrence of twelve grand jurors required for finding.

The concurrence of twelve of the grand jurors shall be necessary to the finding of an indictment or making a presentment.

HISTORY: Codes, 1880, § 3005; 1892, § 1345; 1906, § 1417; Hemingway's 1917, § 1173; 1930, § 1197; 1942, § 2440.

Cross References — Constitutional provision on indictable offenses, see Miss. Const. Art. 3, § 27.

Charge to grand jury, see § 13-5-47.

Grand jury convening in vacation, see MRCrP 13.1, 13.3.

JUDICIAL DECISIONS

1. In general.

Presentment of indictment in court by grand jury foreman in other grand jurors' presence implies concurrence of requisite number thereof. Temple v. State, 165 Miss. 798, 145 So. 749, 1933 Miss. LEXIS 276 (Miss. 1933).

Burden was on accused, moving to quash indictment duly signed, presented and filed, to prove that twelve grand jurors did not concur, and that district attorney was in grand jury room when indictment was found; affidavits as to such facts being insufficient. Temple v. State, 165 Miss. 798, 145 So. 749, 1933 Miss. LEXIS 276 (Miss. 1933).

The fact that the foreman of a grand jury was excused from voting where as many as twelve of the grand jurors concurred in finding the indictment did not invalidate the indictment. State v. Coulter, 104 Miss. 764, 61 So. 706, 1913 Miss. LEXIS 84 (Miss. 1913).

RESEARCH REFERENCES

ALR.

Necessity of alleging in indictment or information limitation-tolling facts. 52 A.L.R.3d 922.

§ 99-7-13. Secret record book; accused may be tried on copy made from record book.

The clerk of the circuit court shall, within ten days after the adjournment of each term of court, record the indictments returned into court in a well-bound book to be kept for that purpose which shall be styled "Secret Record of Indictments," and which shall be properly indexed and kept secret. If the office of the clerk be furnished with an iron safe or vault, the book shall be kept therein when not in actual use. If an indictment be lost or destroyed, the accused may be tried on a certified copy of the indictment made from the said record-book.

HISTORY: Codes, 1892, § 1347; 1906, § 1419; Hemingway's 1917, § 1175; 1930, § 1199; 1942, § 2442.

Cross References — Circuit court criminal docket, see § 9-7-175.
Penalty for disclosing facts about indictment, see § 97-9-53.
Secrecy of grand jury proceedings, see MRCrP 13.5.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2442] is constitutional. A defendant can be tried upon the certified copy of the secret record. McGuire v. State, 76 Miss. 504, 25 So. 495, 1898 Miss. LEXIS 148 (Miss. 1898).

RESEARCH REFERENCES

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 61 et seq.

CJS.

42 C.J.S., Indictments and Informations § 57.

§ 99-7-15. Authority to inspect indictment limited to certain officers until arrest made.

An indictment returned into the clerk of the circuit court, shall not be inspected by any person but the judge, clerk, district attorney, and sheriff, until the defendant shall have been arrested or has entered into bail or recognizance for the offense.

HISTORY: Codes, 1857, ch. 64, art. 259; 1871, § 2796; 1880, § 3007; 1892, § 1348; 1906, § 1420; Hemingway's 1917, § 1176; 1930, § 1200; 1942, § 2443; Laws, 1991, ch. 421, § 2, eff from and after July 1, 1991.

Cross References — Secrecy of grand jury proceedings, see MRCrP 13.5.

OPINIONS OF THE ATTORNEY GENERAL

A sheriff is authorized to obtain information concerning which indictments have been returned with a true bill or no bill, and this information may be acquired from the district attorney or through a personal inspection of the indictments. Ferrell, July 3, 1997, A.G. Op. #97-0379.

Narcotics task force agents who are

contract agents with the Mississippi Bureau of Narcotics have the power to execute a capias warrant issued pursuant to a grand jury indictment if such warrant is directed to such agents after it has been issued. Bowen, July 11, 1997, A.G. Op. #97-0408.

A district attorney (as a "person in charge of a law enforcement agency") or a circuit court clerk (as an officer of the court) may comply with Section 45-27-9 by providing to the Mississippi Justice Information Center the information on a capias that either cannot or has not been served within a reasonable time period; if for some reason the sheriff cannot serve the capias on the defendant and returns the capias unserved, the information on the capias may be provided to the Mississippi Justice Information Center without violation of Section 97-9-53 or 99-7-15. Kitchens, Jr., April 17, 2000, A.G. Op. #2000-0192.

§ 99-7-17. Dilatory pleas; must be verified by oath.

A plea in abatement, or other dilatory plea to an indictment, shall not be received, unless the same be verified by the oath of the defendant.

HISTORY: Codes, Hutchinson's 1848, ch. 59, art. 1(50); 1857, ch. 64, art. 296; 1871, § 2760; 1880, § 3010; 1892, § 1352; 1906, § 1424; Hemingway's 1917, § 1180; 1930, § 1204; 1942, § 2447.

Cross References — Dilatory pleas; amendment of indictment or information, see § 99-7-19.

§ 99-7-19. Dilatory pleas; amendment of indictment or information.

An indictment or information shall not be abated by reason of any misnomer or dilatory plea; but in such case the court shall forthwith cause the same to be amended according to the proof, and proceed as though such plea had not been pleaded; and an indictment shall not be held insufficient for want of, or imperfection in, the addition of any defendant.

HISTORY: Codes, 1857, ch. 64, art. 267; 1871, § 2804; 1880, § 3011; 1892, § 1353; 1906, § 1425; Hemingway's 1917, § 1181; 1930, § 1205; 1942, § 2448.

Cross References — Dilatory pleas must be verified by oath, see § 99-7-17.

Amendment of indictment where person whose name is unknown is afterward found to be known, see § 99-7-25.

Amendments in criminal case when variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal courts, see § 99-35-11.

JUDICIAL DECISIONS

1. In general.

Where the appellant failed to plead that his surname was not shown in the indictment before pleading not guilty, he waived his right to claim that he was not the person named in the indictment, and the trial court was not required to amend the indictment on its own motion. Anselmo v. State, 312 So. 2d 712, 1975 Miss. LEXIS 1656 (Miss. 1975).

In a prosecution for rape, the omission of the Christian name of the accused constituted a formal defect in the indictment but the omission was not fatal and the court properly permitted amendment by inserting defendant's Christian name. Gillespie v. State, 215 Miss. 380, 61 So. 2d 150, 1952 Miss. LEXIS 577 (Miss. 1952).

Indictment for forgery is defective but amendable when it fails to allege the names of the individual persons composing the partnership defrauded by the forged instrument. Wilson v. State, 204 Miss. 111, 37 So. 2d 19, 1948 Miss. LEXIS 348 (Miss. 1948).

RESEARCH REFERENCES

ALR.

Sufficiency of indictment, information, or other forms of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 A.L.R.3d 968.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 160 et seq.

CJS.

42 C.J.S., Indictments and Informations §§ 302 et seq.

§ 99-7-21. Demurrers; when filed; amendment of indictment.

All objections to an indictment for a defect appearing on the face thereof, shall be taken by demurrer to the indictment, and not otherwise, before the issuance of the venire facias in capital cases, and before the jury shall be impaneled in all other cases, and not afterward. The court for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended, and thereupon the trial shall proceed as if such defect had not appeared.

HISTORY: Codes, 1857, ch. 64, art. 268; 1871, § 2805; 1880, § 3012; 1892, § 1354; 1906, § 1426; Hemingway's 1917, § 1182; 1930, § 1206; 1942, § 2449.

Cross References — Amendments in criminal case when variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal courts, see § 99-35-11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Amendment.
3. Loss of remedy by failure to demur.
4. Matters subject to attack at any time.

1. In general.

Although defendant, who was convicted of statutory rape, asserted that his indictment lacked the grand-jury foreman's signature and was not marked "filed," with the entry signed and dated by the circuit-court clerk, the appellate court found that these alleged defects in the indictment were nonjurisdictional. Johnson v. State, 196 So. 3d 1118, 2016 Miss. App. LEXIS 475 (Miss. Ct. App. 2016).

Trial court did not err in allowing the trial to proceed with the amended indictment, which replaced "confidential informant" with the named co-defendant, because defendant could not have been "surprised" by the State's attempt to prove defendant transferred cocaine to co-defendant, and defendant knew of the circumstances of his arrest and the possibility of the State needing to prove defendant transferred cocaine to co-defendant. Jones v. State, 912 So. 2d 973, 2005 Miss. LEXIS 704 (Miss. 2005), cert. denied, 547 U.S. 1043, 126 S. Ct. 1624, 164 L. Ed. 2d 339, 2006 U.S. LEXIS 2564 (U.S. 2006).

A trial court did not err in overruling a defendant's motion to quash the indictment and/or demur to the indictment, even though the minutes of the court did not reflect that a grand jury foreman was appointed or that the foreman was given the oath as required by § 13-5-45, where one of the names of the grand jurors was listed on the indictment as the grand jury foreman, the foreman signed the grand jury report and indictment in the slot where the foreman signs, and the foreman's name was listed along with the other sworn grand jurors, since the statute does not provide that the court minutes must reflect that a grand jury foreman was appointed and sworn. Rogers v. State, 599 So. 2d 930, 1992 Miss. LEXIS 123 (Miss.), overruled in part, Mayfield v. State, 612 So. 2d 1120, 1992 Miss. LEXIS 861 (Miss. 1992).

An indictment charging defendant with aggravated assault, apparently in violation of § 97-3-7(2), was substantially defective in that it did not set out any alleged overt act whatsoever regarding defendant's alleged attempt to cause bodily harm to a patrolman, and, thus, his failure to file a demurrer under the provisions of § 99-7-21 did not prevent him from challenging the indictment. Joshua v. State, 445 So. 2d 221, 1984 Miss. LEXIS 1582 (Miss. 1984), overruled, Brooks v. State, 18 So. 3d 833, 2009 Miss. LEXIS 471 (Miss. 2009).

In a prosecution for attempted escape, the trial court erred in sentencing defendant, who was under a sentence of life imprisonment for a murder conviction, to a term of two years under § 97-9-49, where the correct sentence for defendant under § 97-9-45, which specifically covers persons convicted of escape from custody after being sentenced to the penitentiary for life, would be forfeiture of all earned time toward a parole. Carleton v. State, 438 So. 2d 278, 1983 Miss. LEXIS 2845 (Miss. 1983).

Where five members of the coroner's jury and one arresting officer, who had heard accused voluntarily testify before the coroner's jury, appeared before the grand jury which indicted the accused and testified, accused's objection to the indictment should have been taken by a motion to quash before the issuance of the venire facias. Dykes v. State, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

Assuming that an indictment charging the defendant with an assault with a deadly weapon "with the intent and in the attempt to kill and murder" a named person, charged two offenses, one under § 787, Code of 1930, and the other under § 793 of the code, as contended by defendant, the defendant should have demurred, as the objection appeared on the face of the indictment, and such objection can only be made on demurrer where an offense is charged. Norwood v. State, 182 Miss. 898, 183 So. 523, 1938 Miss. LEXIS 205 (Miss. 1938).

Under statute, a motion to withdraw a plea of not guilty and for permission to file a demurrer to an indictment after a jury had been impaneled and both sides were ready to offer evidence was properly overruled as not timely. Bryant v. State, 179 Miss. 739, 176 So. 590, 1937 Miss. LEXIS 67 (Miss. 1937).

Where affidavit charging offense is defective on its face, demurrer is necessary to reach defect, and if defect is dehors record, motion to quash and evidence to support motion is necessary to reach defect. Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

Statutory provisions relating to demurrers to and motions to quash indictments held applicable to affidavits charging crime. Sullivan v. State, 150 Miss. 542, 117 So. 374, 1928 Miss. LEXIS 184 (Miss. 1928); Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

The facts alleged by a plea in bar are admitted on demurrer only for the purpose of testing the legal question raised. State v. Mitchell, 95 Miss. 130, 48 So. 963, 1909 Miss. LEXIS 251 (Miss. 1909).

Charging two offenses in the same count is bad practice but can be objected to only by demurrer under this section [Code 1942, § 2449]. Clue v. State, 78 Miss. 661, 29 So. 516, 1900 Miss. LEXIS 165 (Miss. 1900).

Objections to an indictment for defects apparent on its face must be made by demurrer only. Gates v. State, 71 Miss. 874, 16 So. 342, 1894 Miss. LEXIS 32 (Miss. 1894); Norton v. State, 72 Miss. 128, 16 So. 264, 1894 Miss. LEXIS 61 (Miss. 1894); McQueen v. State, 143 Miss. 787, 109 So. 799, 1926 Miss. LEXIS 322 (Miss. 1926); Wallace v. State, 182 Miss. 441, 181 So. 522, 1938 Miss. LEXIS 175 (Miss. 1938).

2. Amendment.

Even if defendant had timely objected to the indictment alleging the expiration of the statute of limitations for the first two years of the indictment's time span, the circuit court's solution would have been to amend the indictment to reflect a time period not in conflict with any alleged statute-of-limitations issues, which was essentially done when defense counsel requested and was granted jury instructions that limited the time span for the offenses to 15 months that were within the statute of limitations. Hines v. State, 126 So. 3d 985, 2013 Miss. App. LEXIS 819 (Miss. Ct. App. 2013).

Because the amendment to defendant's indictment did not alter his defense, it was proper; the amendment merely corrected the sentencing date of one of the underlying convictions contained in the habitual-offender portion of the indictment, and the original indictment put defendant on notice that the State planned to use his prior conviction to enhance his sentence. Peterson v. State, 37 So. 3d 669, 2010 Miss. App. LEXIS 58 (Miss. Ct. App. 2010).

Defendant was not prejudiced by the last-minute amendment to the indictment accusing him of a drug sale when the change was merely a change of the date on which the transaction allegedly took place. Alexander v. State, 875 So. 2d 261, 2004 Miss. App. LEXIS 558 (Miss. Ct. App. 2004).

It was not error to permit the amendment of an indictment for murder to change the date of the offense from "on or about June 10, 1995" to "on or about June 7, 1995," i.e. from the date of death of the victim to the date of the crime, since such amendment was one of form rather than substance. James v. State, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000), op. withdrawn, sub. op., 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

Indictment may only be amended at trial if amendment is immaterial to merits of case and if defense will not be prejudiced by amendment; test for whether amendment to indictment will prejudice defense is whether defense, as it originally stood, would be equally available after amendment is made. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

Amendment to indictment as to substance of charge must be made by grand jury. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

Amendment of indictment from sexual battery to attempted sexual battery during trial did not prejudice defendant; by virtue of attempt statute, defendant had notice that he could be convicted of attempt charge. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

A trial court committed reversible error in allowing an indictment to be amended to charge the defendant with a violation of § 97-3-95(2) for sexual battery of a female "over" the age of 14 years, instead of § 97-3-95(1) for sexual battery of a female "under the age of 14 years, since the defendant's defense that the victim was not under 14 years of age but was 26 years old would have required the jury to return a verdict of acquittal; the amendment was "of substance" and was therefore beyond the power of the trial court to authorize. Rhymes v. State, 638 So. 2d 1270, 1994 Miss. LEXIS 321 (Miss. 1994).

A trial court did not err in allowing the State to amend an indictment charging the defendant with touching a child for a lustful purpose under § 97-5-23 by changing the dates on which the offenses occurred since the change was one of mere form rather than substance. Baine v. State, 604 So. 2d 258, 1992 Miss. LEXIS 350 (Miss. 1992).

A second indictment against a defendant, which added that the defendant was charged as a habitual offender, was not an improper amendment without the required action of the grand jury, since the second indictment was not an amendment of the original amendment on motion by the State, but was a second indictment returned by a grand jury. Wilson v. State, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

In a prosecution for aggravated assault under § 97-3-7, the defendant's conviction would be reversed where the grand jury returned the indictment under § 97-3-7(2)(b), which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under § 97-3-7(2)(a), which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. Quick v. State, 569 So. 2d 1197, 1990 Miss. LEXIS 662 (Miss. 1990).

An amendment of an indictment which charged the defendant as a habitual offender under § 99-19-81 rather than § 99-19-83, which imposes a greater sentence than does § 99-19-81, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Nathan v. State, 552 So. 2d 99, 1989 Miss. LEXIS 470 (Miss. 1989).

A court committed reversible error in permitting the State to amend an indictment charging aggravated assault at the close of the State's case, at a time when the defendant had indicated his desire to file a motion for a directed verdict, from the charge "by shooting the [victim] in the head" to that of "a pistol, a means likely to produce serious bodily harm." Had the court not permitted the amendment of the indictment, the defendant would have been entitled to a directed verdict of not guilty on the aggravated assault charge of shooting the victim in the head with the pistol since the evidence was uncontradicted that the gun accidentally fired and that the victim was not wounded by the firing of the weapon. Griffin v. State, 540 So. 2d 17, 1989 Miss. LEXIS 144 (Miss. 1989).

It was not error for trial judge to not allow defendant to amend indictment to charge him with simple assault rather than gratification of lust, because indictment may only be amended for matters of form and not of substance, and trial court cannot amend indictment to change charge therein to another crime, except by action of grand jury which returned indictment; where defendant actually desired submission of lesser charge for deliberation by jury, which trial court did, amendment would be merely idle gesture. Shive v. State, 507 So. 2d 898, 1987 Miss. LEXIS 2548 (Miss. 1987).

As in Mississippi, indictments can be amended in federal courts for matters of form but not substance, and the standards for judging the sufficiency of an indictment are essentially the same in both jurisdictions. Copeland v. State, 423 So. 2d 1333, 1982 Miss. LEXIS 2401 (Miss. 1982).

In a prosecution for armed robbery, the trial court did not err in allowing the state to amend the indictment to change the amount from $5,000 to $1,700. This amendment was of form and not of substance, and was properly allowed under this section and Code 1972 § 99-17-13. Sanders v. State, 313 So. 2d 398, 1975 Miss. LEXIS 1673 (Miss. 1975).

Where 2 dates appear in an affidavit or an indictment, one of which is impossible and apparently a clerical error, the indictment is not invalid but may be amended. Torrence v. State, 283 So. 2d 595, 1973 Miss. LEXIS 1232 (Miss. 1973).

An indictment charging arson in the disjunctive by use of the word "or" may properly be amended to charge the offense in the conjunctive by substituting the word "and" for the word "or". Byrd v. State, 228 So. 2d 874, 1969 Miss. LEXIS 1408 (Miss. 1969).

Affidavit on which criminal prosecution is based, not demurred to for defect appearing on the face, will be treated as sufficient; defect on face of affidavit, on which person is prosecuted in justice court, may be amended in circuit court on appeal; affidavit on which prosecution for failing to turn motor truck to right of center of highway on meeting another was based, not demurred to, held sufficient. Sullivan v. State, 150 Miss. 542, 117 So. 374, 1928 Miss. LEXIS 184 (Miss. 1928).

An instance where the word "liquors" may be inserted into an indictment charging the sale of "spirituous and intoxicating" by way of amendment. Keys v. State, 110 Miss. 433, 70 So. 457, 1915 Miss. LEXIS 50 (Miss. 1915).

3. Loss of remedy by failure to demur.

Defendant neither alleged jurisdictional defect in the indictment, nor did she identify any actual prejudice she suffered as a result of any non-jurisdictional defect, so her claim could not be raised for the first time in her appeal. Brown v. State, 37 So. 3d 1205, 2009 Miss. App. LEXIS 945 (Miss. Ct. App. 2009), cert. denied, 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), cert. denied, 562 U.S. 1015, 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510 (U.S. 2010).

Defendant waived any claim that the indictment was defective because it did not name the confidential informant as the purchaser, and the issue was not raised in the trial court by way of a demurrer as required by Miss. Code Ann. § 99-7-21. Griffin v. State, 918 So. 2d 882, 2006 Miss. App. LEXIS 12 (Miss. Ct. App. 2006).

Defendant first argued that the indictment issued against him was defective, as the indictment misspelled his last name. However, the issue was not properly before the appellate court, as there was no substantive error in the indictment and because defendant did not object to the indictment at the trial level; thus, the issue was waived on appeal. Forkner v. State, 902 So. 2d 615, 2004 Miss. App. LEXIS 1105 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 345 (Miss. 2005).

Motion to quash capital murder indictment, made before issuance of venire facias and renewed following impanelment of jury, was timely, where defendant did not press court to rule on initial motion in reliance upon state's assurance that burglary count was predicated on underlying assault and state subsequently informed defendant five days before trial that it might prosecute other felonies not named in indictment as basis for burglary charge. State v. Berryhill, 703 So. 2d 250, 1997 Miss. LEXIS 532 (Miss. 1997).

An indictment's formal defect in failing to conclude with the words, "against the peace and dignity of the State of Mississippi," is curable by amendment; thus, such a defect is subject to waiver for the failure to demur to the indictment in accordance with § 99-7-21. Brandau v. State, 662 So. 2d 1051, 1995 Miss. LEXIS 301 (Miss. 1995).

In a prosecution for possession of a deadly weapon by a defendant previously convicted of a felony, failure to charge in the indictment that the weapon had been "concealed in whole or in part" as provided in § 97-37-1 did not entitle defendant to a directed verdict and a peremptory instruction of not guilty where the defense never objected to the defective indictment by means of a demurrer as required by this section, where the defendant was fully informed of the charges against him by the inclusion in the indictment of § 97-37-5 in conjunction with § 97-37-1, and where there was no statute making it a crime to carry a deadly weapon unless it was concealed in whole or in part. Jones v. State, 383 So. 2d 498, 1980 Miss. LEXIS 1983 (Miss. 1980).

In a prosecution for unlawful possession of a controlled substance described as preludin, the omission of a recital in the indictment that preludin contained phenmetrazine was an omission of substance, so that the trial court was without power under Code 1972 § 99-7-21 to allow the state to amend the indictment to correct the omission, notwithstanding defendant's failure to demur or otherwise challenge the sufficiency of the indictment; in order to make out a prima facie case under the indictment, it was necessary for the state to prove extrinsic facts showing that preludin contained phenmetrazine, a controlled substance under Code 1972 § 41-29-115, since preludin itself is not designated as a controlled substance. Anthony v. State, 349 So. 2d 1066, 1977 Miss. LEXIS 2203 (Miss. 1977).

Where a county had been divided into two judicial districts for purpose of holding circuit and chancery courts, with each district to stand exactly as if it were a separate county, failure of the indictment to allege from which district the grand jurors were selected or in which district the crime was committed was a formal defect and could be amended; being amendable, the defect could not be raised for the first time in the Supreme Court. Bolen v. State, 309 So. 2d 524, 1975 Miss. LEXIS 1882 (Miss. 1975).

Where, prior to the empaneling of a jury, the defendant failed to interpose a demurrer to an indictment charging a violation of the tax provisions of the Local Option Alcoholic Beverage Control Law but which failed to charge that the defendant "engaged or continued" in the business of selling intoxicating liquor without paying the required tax, objection to the sufficiency of the indictment cannot be raised for the first time on appeal. Northcutt v. State, 206 So. 2d 824, 1967 Miss. LEXIS 1245 (Miss. 1967).

An indictment for burglary which stated in the body thereof that the grand jurors were taken from Sunflower County where in fact they were taken from Humphreys County was defective as to form but did not prejudice the defendant nor violate any of his constitutional rights and the defendant could not raise an objection for the first time after his conviction. Temple v. State, 221 Miss. 569, 73 So. 2d 174, 1954 Miss. LEXIS 564 (Miss. 1954).

In prosecution for murder, a motion to quash an indictment was too late where it was made five days after issuance of venire facias and after the selection of jury, where the defendant had a week after the return of indictment and before the issuance of venire facias in which to file a motion to quash. Forman v. State, 220 Miss. 276, 70 So. 2d 848, 1954 Miss. LEXIS 436 (Miss. 1954).

Where an affidavit charged the defendant did wilfully and unlawfully sell one-half pint of liquor and it was amended to charge defendant with unlawful sale of intoxicating liquor, the affidavit sufficiently indicated the offense intended to be charged and the defect was on the face of it, it was amendable and the failure to demur to it constituted a waiver of defect. Perciful v. Holley, 217 Miss. 203, 63 So. 2d 817, 1953 Miss. LEXIS 423 (Miss. 1953).

In a prosecution for contributing to the delinquency of a minor, where the affidavit was amended to add public drunkenness as an additional act and the record did not disclose any evidence as to surprise and there was no motion by defendant for continuance nor process for additional witnesses, the defendant could not now complain of the amendment. Hall v. State, 211 Miss. 90, 50 So. 2d 924, 1951 Miss. LEXIS 334 (Miss. 1951).

An original affidavit upon which prosecution for contributing to delinquency of a minor was based must be considered as sufficient where no demurrer was filed. Hall v. State, 211 Miss. 90, 50 So. 2d 924, 1951 Miss. LEXIS 334 (Miss. 1951).

If the insufficiency of an indictment was due to a defect which could have been remedied by the trial court, by an amendment, the point is waived by the accused if he fails to interpose a demurrer. Crosby v. State, 191 Miss. 173, 2 So. 2d 813, 1941 Miss. LEXIS 155 (Miss. 1941).

An indictment charging the crime of assault and battery on a named person with intent to kill and murder was not void for failing to charge that such person was a human being, since at most, it was only defective, and if a defect it should have been availed of by demurrer to the indictment prior to the impanelling of the jury and could not be raised first on appeal. Rowland v. State, 182 Miss. 886, 183 So. 527, 1938 Miss. LEXIS 208 (Miss. 1938).

Defendant not demurring to robbery indictment for omission of word "by" before "means" cannot complain of such amendable defect after verdict. Williamson v. State, 167 Miss. 783, 149 So. 795, 1933 Miss. LEXIS 130 (Miss. 1933).

The defects in an indictment which can be cured by amendment must be raised by demurrer, and it is too late after verdict to raise the question for the first time. Moran v. State, 137 Miss. 435, 102 So. 388, 1925 Miss. LEXIS 3 (Miss. 1925).

An indictment of a woman for infanticide describing the persons killed as "two certain human beings, the same being her (the defendant's) children," is good after verdict because of the provisions of Code 1892, §§ 1341, 1354, 1435 [Code 1942, §§ 2436, 2449, 2532]. Wilkinson v. State, 77 Miss. 705, 27 So. 639, 1900 Miss. LEXIS 24 (Miss. 1900).

4. Matters subject to attack at any time.

A substantive defect in an indictment cannot be cured by extrinsic proof and is not waived by the failure to demur thereto. Copeland v. State, 423 So. 2d 1333, 1982 Miss. LEXIS 2401 (Miss. 1982).

Lack of specificity in indictment as to accused having "been previously convicted of a felony" was not a formal defect correctable by amendment under § 99-7-21, and by failing to demur, accused did not waive the defect. Morgan v. United States Fidelity & Guaranty Co., 291 So. 2d 741, 1974 Miss. LEXIS 1749 (Miss. 1974).

Where an indictment failed to charge an essential element of the crime sought to be charged, the point was not waivable by the accused and might be raised for the first time on appeal. Burchfield v. State, 277 So. 2d 623, 1973 Miss. LEXIS 1421 (Miss. 1973), but see Monk v. State, 532 So. 2d 592, 1988 Miss. LEXIS 501 (Miss. 1988).

An indictment for embezzlement that does not set out the name of the owner of the property embezzled is fatally defective, and the defect was not waived by the defendant's failure to demur. Meyer(S) v. State, 193 So. 2d 728, 1967 Miss. LEXIS 1563 (Miss. 1967).

This section [Code 1942, § 2449] does not preclude an appellant from raising the insufficiency of an indictment to charge an offense on appeal, notwithstanding that the accused failed to demur to the same in trial court. Cohran v. State, 219 Miss. 767, 70 So. 2d 46, 1954 Miss. LEXIS 384 (Miss. 1954).

An allegation as to the ownership of the building said to have been burglarized being an essential element of an indictment for burglary, failure of an indictment for burglary to contain such allegation was fatally defective, and could not be remedied by amendment. Crosby v. State, 191 Miss. 173, 2 So. 2d 813, 1941 Miss. LEXIS 155 (Miss. 1941).

Failure of an indictment for burglary to contain the required allegation as to the ownership of the property claimed to have been burglarized is not a variance, and so does not render applicable a statutory provision permitting an amendment to an indictment in the discretion of the court, whenever, on the trial of the indictment, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof. Crosby v. State, 191 Miss. 173, 2 So. 2d 813, 1941 Miss. LEXIS 155 (Miss. 1941).

An indictment for obtaining money on checks fraudulently must allege intent to defraud and this fatal error is not waived by failure to demur thereto. Herron v. State, 118 Miss. 420, 79 So. 289, 1918 Miss. LEXIS 91 (Miss. 1918).

An omission in an indictment for a felony going to the very essence of the offense renders it void and subject to attack at any time notwithstanding this section [Code 1942, § 2449]. Cook v. State, 72 Miss. 517, 17 So. 228, 1895 Miss. LEXIS 4 (Miss. 1895); Taylor v. State, 74 Miss. 544, 21 So. 129, 1896 Miss. LEXIS 150 (Miss. 1896).

RESEARCH REFERENCES

ALR.

Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations as to place. 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 A.L.R.3d 1358.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money. 15 A.L.R.3d 1357.

Power of court to make or permit amendment of indictment with respect to allegations as to money. 16 A.L.R.3d 1076.

Power of court to make or permit amendment of indictment with respect to allegations as to criminal intent or scienter. 16 A.L.R.3d 1093.

Power of court to make or permit amendment of indictment. 17 A.L.R.3d 1181.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions. 17 A.L.R.3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances. 17 A.L.R.3d 1285.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 160 et seq., 282 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Indictments and Informations, Form 71, (demurrer).

CJS.

42 C.J.S., Indictments and Informations §§ 293 et seq., 302 et seq.

§ 99-7-23. Motions to quash.

All objections to an indictment for any defect dehors the face thereof, presenting an issue to be tried by the court, shall be taken by motion to quash the indictment, and not otherwise, within the time allowed for demurrer, and with the right to amend, as provided in the last preceding section.

HISTORY: Codes, 1857, ch. 64, art. 268; 1871, § 2805; 1880, § 3012; 1892, § 1355; 1906, § 1427; Hemingway's 1917, § 1183; 1930, § 1207; 1942, § 2450.

Cross References — Amendments in criminal case when variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal court, see § 99-35-11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Timeliness.
3. Appropriateness.

1. In general.

Defendant's challenge to her indictment was procedurally barred because defendant failed to raise the issue in the circuit court; the indictment clearly alleged both of the essential elements of the aggravated driving while under the influence statute, and thus, the alleged defect was not "jurisdictional" in nature. Dartez v. State, 271 So. 3d 733, 2018 Miss. App. LEXIS 636 (Miss. Ct. App. 2018).

The function of a motion to quash is to test the legality of an indictment for some defect not appearing on the face of the indictment, and neither a motion to quash nor any other pretrial pleading can be employed to test the sufficiency of the evidence to support the indictment. State v. Grady, 281 So. 2d 678, 1973 Miss. LEXIS 1499 (Miss. 1973).

Where defendant's neighbor, a private person, not connected with the police and observed from his own premises marijuana growing on defendant's adjoining land, and after conversation with an officer, he went back alone and at his own election, and plucked several of the plants which he later took to the police, and there was no participation by the police in any of these actions and nothing at all was done by them until after a search warrant had been issued, trial court did not err in denying a motion to suppress the evidence and quash the indictment on grounds that the neighbor committed a trespass upon defendant's land in obtaining the marijuana plants. Wolf v. State, 281 So. 2d 445, 1973 Miss. LEXIS 1497 (Miss. 1973).

Grand jurors are incompetent to testify that return of an indictment was influenced by presence of circuit judge in grand jury room and by his participation in its deliberations, for purpose of impeaching the indictment on a motion to quash. Sanders v. State, 198 Miss. 587, 22 So. 2d 500, 1945 Miss. LEXIS 231 (Miss. 1945).

Where affidavit charging offense is defective on its face, demurrer is necessary to reach defect, and if defect is dehors record, motion to quash and evidence to support motion is necessary to reach defect. Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

Statutory provisions relating to demurrers to and motions to quash indictments held applicable to affidavits charging crime. Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

Objections dehors the face of an indictment are properly presented by motion to quash. State v. Coulter, 104 Miss. 764, 61 So. 706, 1913 Miss. LEXIS 84 (Miss. 1913); Chandler v. State, 143 Miss. 312, 108 So. 723, 1926 Miss. LEXIS 268 (Miss. 1926).

The absence of a formal order permitting the filing of a motion to quash is waived by failure to object. Hardy v. State, 96 Miss. 844, 51 So. 460, 1910 Miss. LEXIS 176 (Miss. 1910).

An indictment should not be quashed for failure to allege facts which may properly be shown under a plea of not guilty. State v. Mitchell, 95 Miss. 130, 48 So. 963, 1909 Miss. LEXIS 251 (Miss. 1909); Hays v. State, 96 Miss. 153, 50 So. 557, 1909 Miss. LEXIS 30 (Miss. 1909); Hardy v. State, 96 Miss. 844, 51 So. 460, 1910 Miss. LEXIS 176 (Miss. 1910).

Where a judgment quashing an indictment is reversed on appeal by the state, the case will be remanded and a new trial ordered on the same indictment. State v. McDowell, 72 Miss. 138, 17 So. 213, 1894 Miss. LEXIS 133 (Miss. 1894); State v. Jolly, 73 Miss. 42, 18 So. 541, 1895 Miss. LEXIS 78 (Miss. 1895); State v. Gillis, 75 Miss. 331, 24 So. 25, 1897 Miss. LEXIS 149 (Miss. 1897); State v. Bacon, 77 Miss. 366, 27 So. 563, 1899 Miss. LEXIS 78 (Miss. 1899).

2. Timeliness.

Motion to quash capital murder indictment, made before issuance of venire facias and renewed following impanelment of jury, was timely, where defendant did not press court to rule on initial motion in reliance upon state's assurance that burglary count was predicated on underlying assault and state subsequently informed defendant five days before trial that it might prosecute other felonies not named in indictment as basis for burglary charge. State v. Berryhill, 703 So. 2d 250, 1997 Miss. LEXIS 532 (Miss. 1997).

Where five members of the coroner's jury and one arresting officer, who had heard accused voluntarily testify before the coroner's jury, appeared before the grand jury which indicted the accused and testified, accused's objection to the indictment should have been taken by a motion to quash before the issuance of the venire facias. Dykes v. State, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

The legislature in enacting this section [Code 1942, § 2450] had in mind that if a defendant expects to bring some action to an indictment, it should be done before the county is put to the large expense of summoning a special venire and incurring liability for mileage and fees to the prospective jurors thus brought to court. Forman v. State, 220 Miss. 276, 70 So. 2d 848, 1954 Miss. LEXIS 436 (Miss. 1954).

In prosecution for murder, a motion to quash an indictment was too late where it was made five days after issuance of venire facias and after the selection of jury, where the defendant had a week after the return of indictment and before the issuance of venire facias in which to file a motion to quash. Forman v. State, 220 Miss. 276, 70 So. 2d 848, 1954 Miss. LEXIS 436 (Miss. 1954).

Motion to quash affidavit charging offense, made at conclusion of state's evidence and during introduction of defendant's evidence, and which failed to name defect in affidavit, held properly overruled as being too general and as coming too late. Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

3. Appropriateness.

A trial court did not err in overruling a defendant's motion to quash the indictment and/or demur to the indictment, even though the minutes of the court did not reflect that a grand jury foreman was appointed or that the foreman was given the oath as required by § 13-5-45, where one of the names of the grand jurors was listed on the indictment as the grand jury foreman, the foreman signed the grand jury report and indictment in the slot where the foreman signs, and the foreman's name was listed along with the other sworn grand jurors, since the statute does not provide that the court minutes must reflect that a grand jury foreman was appointed and sworn. Rogers v. State, 599 So. 2d 930, 1992 Miss. LEXIS 123 (Miss.), overruled in part, Mayfield v. State, 612 So. 2d 1120, 1992 Miss. LEXIS 861 (Miss. 1992).

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. Smallwood v. State, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

An indictment may not be challenged because of incompetent evidence. Hood v. State, 523 So. 2d 302, 1988 Miss. LEXIS 74 (Miss. 1988).

Determination of sufficiency of evidence proposed to be presented to support crime charged in indictment is not appropriate matter for motion to quash. State v. Peoples, 481 So. 2d 1069, 1986 Miss. LEXIS 2337 (Miss. 1986).

When constable resigns from office and does not seek re-election in compliance with agreement with district attorney, in which district attorney agrees not to prosecute constable, and constable is subsequently indicted for extortion, constable is entitled to have indictment quashed. Edwards v. State, 465 So. 2d 1085, 1985 Miss. LEXIS 1989 (Miss. 1985).

An indictment will not be quashed because found by a grand jury after it had been orally discharged, where no order had been entered. Earnest v. State, 237 Miss. 509, 115 So. 2d 295, 1959 Miss. LEXIS 497 (Miss. 1959).

Murder indictment was quashed for conduct of circuit judge in entering grand jury room and informing grand jurors that, because of absence of district attorney due to illness in his family, the circuit judge would perform the duties of district attorney pending the latter's arrival at court, in running over dockets with grand jurors and requesting them to take up the murder case in question, and being in grand jury room when sheriff exhibited weapon used in the homicide and heard the sheriff's testimony, notwithstanding that the circuit judge was actuated by the best of motives and took particular pains not to express an opinion as to what their presentment should be, and was not in the grand jury room when the grand jurors discussed the evidence and voted upon the indictment. Sanders v. State, 198 Miss. 587, 22 So. 2d 500, 1945 Miss. LEXIS 231 (Miss. 1945).

Statements by circuit judge dictated into record that he informed grand jury, that, because of absence of district attorney due to illness in his family, the circuit judge would advise the grand jury and would generally perform the duties of district attorney pending the latter's arrival at court, that circuit judge returned to the grand jury room after they had organized, ran over the docket with them, requested them to take up a particular homicide case, was in the grand jury room when the sheriff exhibited the weapon used in the homicide and heard the sheriff's testimony, but that the circuit judge took particular pains not to express an opinion as to what the grand jurors' presentment should be, as well as not to be in the grand jury room when they discussed the evidence and voted upon indictments, constituted an adverse ruling on motion to quash the particular homicide indictment on grounds that circuit judge acted as district attorney and his presence in the grand jury room, in view of fact that the court immediately proceeded to try the case on its merits under such indictment. Sanders v. State, 198 Miss. 587, 22 So. 2d 500, 1945 Miss. LEXIS 231 (Miss. 1945).

A motion to quash was the appropriate remedy to attack an indictment based upon documents and papers obtained from the defendant under a writ of duces tecum, in view of defendant's immunity from prosecution under such circumstances. State v. Bates, 187 Miss. 172, 192 So. 832, 1940 Miss. LEXIS 209 (Miss. 1940).

Where motion to quash affidavit charging offense was too general in that it failed to set out alleged defect and was not supported by evidence, motion to quash affidavit, made before jury was impaneled, held properly overruled. Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

Motion to quash affidavit charging offense, made at conclusion of state's evidence and during introduction of defendant's evidence, and which failed to name defect in affidavit, held properly overruled as being too general and as coming too late. Wampold v. State, 170 Miss. 732, 155 So. 350, 1934 Miss. LEXIS 170 (Miss. 1934).

Motion to quash indictment held properly denied where there was no offer of evidence by defendant when case was tried on merits in support of allegations. Smith v. State, 158 Miss. 355, 128 So. 891, 1930 Miss. LEXIS 12 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Privilege against self-incrimination as to testimony before grand jury. 38 A.L.R.2d 225.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment. 23 A.L.R.4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 160 et seq., 276, 278 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Indictments and Informations, Forms 91 et seq., 111 et seq., (motion to quash, dismiss, or set aside).

CJS.

42 C.J.S., Indictments and Informations §§ 265-268 et seq., 302 et seq.

§ 99-7-25. Amendment where name of unknown defendant is discovered.

If any indictment describes a defendant as a person whose name is to the jurors unknown, and it afterward appears that at the time of finding the bill his name was known, the court may order the indictment to be amended according to the fact.

HISTORY: Codes, 1857, ch. 64, art. 263; 1871, § 2800; 1880, § 3014; 1892, § 1357; 1906, § 1429; Hemingway's 1917, § 1185; 1930, § 1209; 1942, § 2452.

Cross References — Publication of summons for unknown heirs and unknown defendants in chancery court proceedings, see § 13-3-25.

Amendment of indictment or information in case of misnomer, or dilatory plea, see § 99-7-19.

Amendments in criminal case where variance is found between matter stated in indictment and proof, see § 99-17-13.

Amendments to proceedings brought up from justice of the peace or municipal court, see § 99-35-11.

JUDICIAL DECISIONS

1. In general.

Where the appellant failed to plead that his surname was not shown in the indictment before pleading not guilty, he waived his right to claim that he was not the person named in the indictment, and the trial court was not required to amend the indictment on its own motion. Anselmo v. State, 312 So. 2d 712, 1975 Miss. LEXIS 1656 (Miss. 1975).

Variance between the name of accused in an indictment and the name under which he was extradited is immaterial where in all the proof he was named as in the indictment. Stokes v. State, 240 Miss. 453, 128 So. 2d 341, 1961 Miss. LEXIS 477 (Miss. 1961).

RESEARCH REFERENCES

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations § 173.

CJS.

42 C.J.S., Indictments and Informations §§ 174, 309.

§ 99-7-27. Gambling or gaming.

In an indictment for gambling or gaming it shall be sufficient to charge the general name or description of the game at which the defendant may have played, without setting forth or describing with or against whom he may have bet or played; and an objection shall not be sustained to any such indictment for any defect or want of form, but the court shall proceed to give judgment according to the very right of the case.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 3(21); 1857, ch. 64, art. 144; 1871, § 2608; 1880, § 2854; 1892, § 1361; 1906, § 1433; Hemingway's 1917, § 1189; 1930, § 1213; 1942, § 2456.

Cross References — Gambling in general, see §§ 97-33-1 et seq.

Another section derived from same 1942 code section, see § 97-33-5.

RESEARCH REFERENCES

CJS.

38 C.J.S., Gaming §§ 174 et seq.

§ 99-7-29. Intoxicating beverage offenses.

An indictment for a violation of any of the provisions of Chapter 31 of Title 97, Mississippi Code of 1972, entitled "Intoxicating Beverage Offenses" shall not be quashed or abated for want of form, and it shall not be necessary to aver the particular kind of liquors sold.

In any indictment or presentment for any violation of Chapter 31 of Title 97, Mississippi Code of 1972, it shall not be necessary to negative the exceptions therein contained, or that the liquors, bitters and drinks were not ordered, shipped, transported, or delivered for any of the purposes set out in Section 97-31-33 thereof but such exceptions may be relied upon as defense and the burden of establishing the same shall be upon the person claiming the benefits thereof.

HISTORY: Codes, Hutchinson's 1848, ch. 11, art. 5(8); 1857, ch. 20, art. 11; 1871, § 2698; 1880, § 1114; 1892, § 1595; 1906, § 1761; Hemingway's 1917, § 2097; Hemingway's 1921 Supp. § 2163m; 1930, §§ 1985, 2012; 1942, §§ 2624, 2651; Laws, 1918, ch. 189.

Editor's Notes — Sections 97-31-1 and 97-31-3, included in Chapter 31 of Title 97, referred to in this section, were repealed by Laws of 1988, ch. 562, § 3, effective from and after July 1, 1988.

Section 97-31-13, included in Chapter 31 of Title 97, referred to in this section, was repealed by Laws of 1980, ch. 453, effective from and after passage (approved May 1, 1980).

Cross References — Dispensation of formalities in indictment, see § 99-7-3.

JUDICIAL DECISIONS

1. In general.

In charging offense of unlawful possession of wine, it is not necessary to negative exception of homemade wine, and state is not required to prove that wine was not homemade wine used for domestic and household purposes only. Forbert v. State, 179 Miss. 66, 174 So. 248, 1937 Miss. LEXIS 15 (Miss. 1937).

Indictment charging unlawful possession of still held not demurrable because it did not show it was a whisky still. Powe v. State, 176 Miss. 455, 169 So. 763, 1936 Miss. LEXIS 144 (Miss. 1936).

Indictment for possession need not negative exceptions in statute. Frazier v. State, 141 Miss. 18, 106 So. 443, 1925 Miss. LEXIS 227 (Miss. 1925).

That an indictment for unlawful possession of a still must negative exceptions. State v. Speaks, 132 Miss. 159, 96 So. 176, 1923 Miss. LEXIS 46 (Miss. 1923); Dawsey v. State, 136 Miss. 18, 100 So. 526, 1924 Miss. LEXIS 105 (Miss. 1924); State v. Clark, 145 Miss. 207, 110 So. 447, 1926 Miss. LEXIS 15 (Miss. 1926).

RESEARCH REFERENCES

Am. Jur.

45 Am. Jur. 2d, Intoxicating Liquors §§ 266 et seq.

CJS.

48 C.J.S., Intoxicating Liquors §§ 405, 406 et seq.

§ 99-7-31. Terms of indictment for larceny or embezzlement of money.

(1) In indictments for larceny or embezzlement of money or evidences of debt it shall be sufficient to describe the property in general terms, as "money," "bank-notes," "checks," "bills of exchange," "promissory notes," and the like, of or about a certain amount and of certain value; and in an indictment for embezzlement of money or funds by a treasurer, cashier, or other fiduciary, it shall be sufficient to describe the same as a "balance of account" and of a certain value.

(2) In indictments for any crime in which the ownership of property,

whether real or personal, must be alleged and proven, if ownership is vested in any entity other than an individual person, it shall be sufficient to allege and prove a name by which the entity is commonly known; and no indictment shall be held to be insufficient for failing to fully set forth such matters as governmental origins or the names of trustees, council members, supervisors, heirs or other persons with dominion or control over the entity or its property, and proof of such matter shall not be required at any trial upon the indictments.

HISTORY: Codes, 1892, § 1364; 1906, § 1436; Hemingway's 1917, § 1192; 1930, § 1216; 1942, § 2459; Laws, 2006, ch. 426, § 1, eff from and after July 1, 2006.

Cross References — Embezzlement involving public officers, see §§ 97-11-25 through 97-11-31.

Larceny-stealing bond, note, bill, securities or other evidences of debt, see § 97-17-45.

Embezzlement-property held in trust or received on contract, see § 97-23-25.

JUDICIAL DECISIONS

ANALYSIS

1. Larceny.
2. Embezzlement.

1. Larceny.

While this section [Code 1942, § 2459] provides the exception as to descriptions of property in indictments for larceny by allowing the same to be described in general terms where the charge is for larceny of money or evidences of debt, the chapter on criminal procedure does not otherwise abrogate the common-law rule requiring the description of personal property in an indictment for larceny to be reasonably definite and certain. Rutherford v. State, 196 Miss. 321, 17 So. 2d 803, 1944 Miss. LEXIS 195 (Miss. 1944).

A case where the description of money stolen is held to be sufficient where it is described as so many dollars of the value of so many dollars. State v. Walker, 115 Miss. 700, 76 So. 634, 1917 Miss. LEXIS 252 (Miss. 1917).

2. Embezzlement.

An indictment for embezzlement should allege the ownership of the property alleged to have been embezzled. Langford v. State, 239 Miss. 483, 123 So. 2d 614, 1960 Miss. LEXIS 311 (Miss. 1960).

Indictment for embezzlement does not have to set forth evidence, but only enough to inform defendant sufficiently of charge therein laid against him. State v. May, 208 Miss. 862, 45 So. 2d 728, 1950 Miss. LEXIS 306 (Miss. 1950).

Indictment for embezzlement of money received on sale of automobile by agent of seller is not demurrable for failure to state date of alleged sale by agent or name of person to whom automobile was alleged to have been sold. State v. May, 208 Miss. 862, 45 So. 2d 728, 1950 Miss. LEXIS 306 (Miss. 1950).

Indictment charging embezzlement by schoolteacher of money belonging to trustees of school without charging names of the trustees or alleging their names were unknown, is defective. Voss v. State, 208 Miss. 303, 44 So. 2d 402, 1950 Miss. LEXIS 249 (Miss. 1950).

An indictment for embezzling money need not state the value of the money. Richberger v. State, 90 Miss. 806, 44 So. 772, 1907 Miss. LEXIS 122 (Miss. 1907).

RESEARCH REFERENCES

Am. Jur.
26 Am. Jur. 2d, Embezzlement §§ 36 et seq.
50 Am. Jur. 2d, Larceny §§ 108 et seq.

CJS.
29A C.J.S., Embezzlement §§ 36 et seq.

§ 99-7-33. Libel.

An indictment for libel need not set forth any extrinsic facts to show the application of the defamatory matter charged in the indictment to the party libeled, but it shall be sufficient to charge generally that the same was published of or concerning him, and the fact that it was so published must be proved on the trial.

HISTORY: Codes, 1857, ch. 64, art. 256; 1871, § 2793; 1880, § 3017; 1892, § 1360; 1906, § 1432; Hemingway's 1917, § 1188; 1930, § 1212; 1942, § 2455.

Cross References — Criminal libel generally, see §§ 97-3-55, 97-3-57.

RESEARCH REFERENCES

ALR.
Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

Am. Jur.
50 Am. Jur. 2d, Libel and Slander §§ 515 et seq.

§ 99-7-35. Lotteries.

An indictment for any of the crimes defined in Sections 97-33-31 to 97-33-49, Mississippi Code of 1972, being those sections concerning lotteries and raffles, shall be good which charges the crime in the language of the statute, without setting forth therein the number or date of the ticket or the device, or anything in the nature thereof, or policy, or that which represents the same, or the name of the lottery or gift enterprise, or where the same is located, or anything else not expressly embraced in the statutory definition or description of the crime.

HISTORY: Codes, 1871, § 2735; 1880, § 2979; 1892, § 1365; 1906, § 1437; Hemingway's 1917, § 1193; 1930, § 1217; 1942, § 2460.

RESEARCH REFERENCES

Am. Jur.
38 Am. Jur. 2d, Gambling §§ 107 et seq.

CJS.
38 C.J.S., Gaming §§ 131 et seq.
54 C.J.S., Lotteries §§ 30, 34.

§ 99-7-37. Murder and manslaughter.

(1) In an indictment for homicide it shall not be necessary to set forth the

manner in which or the means by which the death of the deceased was caused, but it shall be sufficient to charge in an indictment for murder, that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased. It shall be sufficient, in an indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased, concluding in all cases as required by the Constitution of this state.

(2) An indictment for murder or capital murder shall be sufficient to also charge the lesser offense of manslaughter without a specific allegation of such lesser crime and without any necessity for an additional count charging such lesser crime.

HISTORY: Codes, 1857, ch. 64, art. 265; 1871, § 2802; 1880, § 3016; 1892, § 1359; 1906, § 1431; Hemingway's 1917, § 1187; 1930, § 1211; 1942, § 2454; Laws, 2004, ch. 393, § 2, eff from and after passage (approved Apr. 20, 2004.).

Cross References — Right of accused in criminal prosecution to demand nature and cause of accusation, see Miss. Const. Art. 3, § 26.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Validity.
3. Construction and application.
4. Sufficiency of indictment.
5. Sufficiency of the evidence.
6. Heat of passion instruction.

1. In general.

An indictment charging that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to Code 1942, § 2220 and against the peace and dignity of the State of Mississippi, adequately charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. Dendy v. State, 224 Miss. 208, 79 So. 2d 827, 1955 Miss. LEXIS 481 (Miss. 1955).

Indictment in language of statute for murder need not set forth manner and details of homicide. Talbert v. State, 172 Miss. 243, 159 So. 549, 1935 Miss. LEXIS 120 (Miss. 1935).

2. Validity.

Mississippi capital murder indictments alleging that defendant entered house "to unlawfully do violence to the persons situated therein" were fatally defective for their failure to state intended felony that comprised charged burglary; "intent to do violence" was not a crime, prosecutor based his argument to support charge of burglary upon that "non-crime," and jury was instructed that burglary charge could be predicated upon defendant's intent either to steal or to "unlawfully do violence." Lockett v. Puckett, 988 F. Supp. 1019, 1997 U.S. Dist. LEXIS 20731 (S.D. Miss. 1997), rev'd, vacated, 230 F.3d 695, 2000 U.S. App. LEXIS 25501 (5th Cir. Miss. 2000).

The means and manner of the commission of murder are not necessarily embraced in a description "of the nature and cause of the accusation" in the sense of Art. 3, § 26 of the constitution of the state; hence the statute is constitutional. Newcomb v. State, 37 Miss. 383, 1859 Miss. LEXIS 27 (Miss. 1859).

3. Construction and application.

This section [Code 1942, § 2454] covers all homicides, both statutory and common law, and under an indictment drawn in accordance therewith any facts that evidence murder or manslaughter may be introduced in evidence. Carrol v. State, 183 Miss. 1, 183 So. 703, 1938 Miss. LEXIS 211 (Miss. 1938).

Assault with intent is not within statutory indictment for murder. Bell v. State, 149 Miss. 745, 115 So. 896, 1928 Miss. LEXIS 84 (Miss. 1928); Scott v. State, 60 Miss. 268, 1882 Miss. LEXIS 48 (Miss. 1882).

The word "feloniously" carries with it the idea the killing is unlawful in an indictment for murder. Winston v. State, 127 Miss. 477, 90 So. 177, 1921 Miss. LEXIS 246 (Miss. 1921).

The word "did" in an indictment for murder held to be a part of the offense charged. Hall v. State, 91 Miss. 216, 44 So. 826, 1907 Miss. LEXIS 151 (Miss. 1907).

4. Sufficiency of indictment.

Because the indictment tracked the language of the manslaughter statute and the maltreatment statute, it was sufficient to put defendant on notice of the charges against her; the indictment's use of the common term "misdemeanor manslaughter" did not render it defective, and the indictment specifically identified not only the underlying misdemeanor (maltreatment) but also the type of maltreatment (failure to provide sufficient medical attention). Brannan v. State, — So. 3d —, 2020 Miss. App. LEXIS 593 (Miss. Ct. App. Oct. 20, 2020).

A murder indictment which stated that the defendant, "willfully, and feloniously, with the deliberate design to effect the death" of the two victims, killed them by "suffocation," sufficiently notified defendant of the charges against her, even though expert testimony established the victims died of strangulation, which is not exactly synonymous with suffocation; the purpose of the indictment is to give the accused notice and a reasonable description of the charges, to enable her to prepare a defense, and there is no requirement that it set forth the means of the victims' death. Blakeney v. State, 2009 Miss. App. LEXIS 887 (Miss. Ct. App.), op. withdrawn, sub. op., 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

Denial of the inmate's petition for post-conviction relief was appropriate because his motion was time-barred and there was no applicable exception to the time limit; the supreme court held that the inmate was required, and failed, to prove that he was prejudiced by evidence that should have been excluded in a simple murder trial; additionally, the first portion of his indictment, standing alone, sufficiently charged him with simple murder. Lambert v. State, 941 So. 2d 804, 2006 Miss. LEXIS 485 (Miss. 2006).

Defendant was properly apprised of the nature and cause of a homicide by an indictment, despite the fact that the manner and method of the crime was not disclosed; the jury instructions sufficiently informed the jury that the act committed by defendant involved asphyxiation. Starns v. State, 867 So. 2d 227, 2003 Miss. LEXIS 873 (Miss. 2003).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. State v. Shaw, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), op. withdrawn, sub. op., 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense, and defendant was not prejudiced by the failure of the original indictment to state a specific overt act by which the homicide was committed, particularly where the indictment was amended to read "by shooting with a pistol." Jones v. State, 856 So. 2d 285, 2003 Miss. LEXIS 363 (Miss. 2003).

An indictment charging a defendant with intentional murder and assigning a maximum penalty of life was sufficient to give the defendant fair notice of the crime charged, even though the jury instructions in the ensuing prosecution failed to include a charge that the murder was intentional. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

Murder indictment which follows language of "depraved heart" provision of § 97-3-19 need not use words "malice aforethought." Johnson v. State, 475 So. 2d 1136, 1985 Miss. LEXIS 2238 (Miss. 1985).

The trial court was correct in overruling defendant's demurrer to the indictment in a prosecution for manslaughter, notwithstanding the contention that the indictment should have charged that the death had occurred "by culpable negligence" and that use of the word "willfully" resulted in a charge of voluntary rather than involuntary manslaughter. Yazzie v. State, 366 So. 2d 240, 1979 Miss. LEXIS 2197 (Miss. 1979), overruled in part, State v. Buckhalter, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Where an indictment charged that the defendant did willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder the deceased, the indictment was sufficient to charge murder in the proper terms, and the state was entitled to instructions setting forth both the theory of a premeditated killing and the theory of a homicide resulting from the commission of a crime of violence. Wilson v. J. Ed Turner, Inc., 221 So. 2d 368, 1969 Miss. LEXIS 1497 (Miss. 1969).

An indictment for manslaughter in the statutory form is sufficient. Jones v. State, 244 Miss. 596, 145 So. 2d 446, 1962 Miss. LEXIS 483 (Miss. 1962).

An indictment for manslaughter charging that the defendant "did unlawfully and feloniously kill and slay" a certain person, a human being, was sufficient. Cutshall v. State, 191 Miss. 764, 4 So. 2d 289, 1941 Miss. LEXIS 185 (Miss. 1941).

Manslaughter indictment charging defendant wilfully and feloniously killed certain person by culpable negligence held not defective because of word "wilful." Williams v. State, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, State v. Buckhalter, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Manslaughter indictment charging culpable negligence held not defective because not setting forth conduct constituting culpable negligence. Williams v. State, 161 Miss. 406, 137 So. 106, 1931 Miss. LEXIS 269 (Miss. 1931), overruled in part, State v. Buckhalter, 119 So. 3d 1015, 2013 Miss. LEXIS 405 (Miss. 2013).

Indictment for manslaughter setting up alleged negligence in operation of automobile was sufficient against demurrer. Bradford v. State, 158 Miss. 210, 127 So. 277, 1930 Miss. LEXIS 2 (Miss. 1930).

An indictment for a homicide may follow the form given in the statute and it will be sufficient. Lee v. State, 124 Miss. 398, 86 So. 856, 1920 Miss. LEXIS 522 (Miss. 1920).

5. Sufficiency of the evidence.

Eyewitness testimony of multiple witnesses was sufficient evidence that homicide committed by defendant, an armed late arriver to a nightclub fight, was not self-defense; viewing as true the evidence which supports the jury's verdict, it could not be said that the verdict was so contrary to the overwhelming weight of the evidence that allowing it to stand would result in "an unconscionable injustice." Jones v. State, 856 So. 2d 285, 2003 Miss. LEXIS 363 (Miss. 2003).

6. Heat of passion instruction.

Defendant was not entitled to a heat-of-passion manslaughter instruction under Miss. Code Ann. § 97-3-35 as a lesser included offense of murder under Miss. Code. Ann. § 99-7-37(2) since: (1) defendant's testimony that he snapped did not elevate the shooting to the heat of passion; (2) two witnesses testified that defendant approached the victim from behind and shot him; and (3) even if the victim had previously assaulted him and defendant suspected that he had had a sexual relationship with his wife, there was not an immediate and reasonable provocation. Sanders v. State, 103 So. 3d 775, 2012 Miss. App. LEXIS 795 (Miss. Ct. App. 2012).

RESEARCH REFERENCES

ALR.

Necessity and materiality of statement of place of death in indictment or information charging homicide. 59 A.L.R.2d 901.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Determination of "materiality" under USCS § 1623, penalizing false material declarations before grand jury or court. 60 A.L.R. Fed. 76.

Am. Jur.

40 Am. Jur. 2d, Homicide §§ 199 et seq., 441 et seq.

Law Reviews.

Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

CJS.

40 C.J.S., Homicide §§ 223 et seq.

§ 99-7-39. Perjury.

In an indictment for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant – that he was sworn or testified on oath, and before what court, or before whom the oath or affirmation was taken; averring the court or person to have had competent authority to administer the same, together with proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or the commission or authority of the person before whom the perjury was committed.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 1(40); 1857, ch. 64, art. 211; 1871, § 2667; 1880, § 2928; 1892, § 1362; 1906, § 1434; Hemingway's 1917, § 1190; 1930, § 1214; 1942, § 2457.

Cross References — Conviction for perjury or subornation of perjury disqualifying witness, see § 13-1-11.

Indictment for subornation of perjury, see § 99-7-41.

Perjury generally, see §§ 97-9-59 et seq.

JUDICIAL DECISIONS

1. In general.

An indictment for perjury must specifically allege the true facts; thus, an indictment for perjury was fatally defective and should have been quashed where it did not attempt to set out the truth as to the allegation that the defendant had "testified falsely that he had not been court-martialed in the military and that he had an honorable discharge and a general discharge under honorable conditions from the United States Army." Ford v. State, 610 So. 2d 370, 1992 Miss. LEXIS 747 (Miss. 1992).

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. Smallwood v. State, 584 So. 2d 733, 1991 Miss. LEXIS 405 (Miss. 1991).

Conviction of defendant for perjury was upheld over objection that alleged perjury was not proved by testimony of 2 witnesses or by one witness and corroborating circumstances; common-law rule requiring one witness and corroborating circumstances to sustain perjury conviction refers only to proof of falsity of accused's statement, but does not extend to proof of other elements of crime; testimony of defendant's mother satisfied requirement that one witness testify to falsity of defendant's testimony at trial where perjury was allegedly committed, and her testimony was consistent with defendant's 2 prior sworn statements; to sustain conviction, both of contradictory statements must be under oath. McFee v. State, 510 So. 2d 790, 1987 Miss. LEXIS 2631 (Miss. 1987).

Where an exhibit attached to an indictment for perjury showed on its face that the defendant was not under oath when the allegedly false statements in his application for voter registration were made, the indictment was fatally defective, and in a coram nobis proceeding the defendant was discharged. Echoles v. State, 254 Miss. 133, 180 So. 2d 630, 1965 Miss. LEXIS 936 (Miss. 1965).

To charge that the assistant cashier of a bank "did make oath" is sufficient to show that oath was made in writing. State v. Kelly, 113 Miss. 461, 74 So. 325, 1917 Miss. LEXIS 123 (Miss. 1917).

This section [Code 1942, § 2457] does not dispense with the necessity of averring the substance of the issue on which the perjury is charged to have been committed. To do so would violate Const. 1890 § 26, securing to the defendant the right to demand the nature and cause of the action against him. State v. Silverberg, 78 Miss. 858, 29 So. 761, 1901 Miss. LEXIS 135 (Miss. 1901).

An indictment for perjury must aver what the truth is in relation to the matter of which perjury is assigned. State v. Silverberg, 78 Miss. 858, 29 So. 761, 1901 Miss. LEXIS 135 (Miss. 1901).

An indictment for perjury setting forth the court proceedings, issue and trial in which and date at which the perjury was committed and not otherwise defective is sufficient under this section [Code 1942, § 2457]. State v. Jolly, 73 Miss. 42, 18 So. 541, 1895 Miss. LEXIS 78 (Miss. 1895).

RESEARCH REFERENCES

Am. Jur.
60A Am. Jur. 2d, Perjury §§ 25 et seq.

CJS.
70 C.J.S., Perjury §§ 48 et seq.

§ 99-7-41. Perjury; subornation of perjury.

In an indictment for subornation of perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, or any part of the record or proceeding, either in law or equity, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 1(40); 1857, ch. 64, art. 212; 1871, § 2668; 1880, § 2929; 1892, § 1363; 1906, § 1435; Hemingway's 1917, § 1191; 1930, § 1215; 1942, § 2458.

Cross References — Subornation of perjury, see § 97-9-63.
Indictment for perjury, see § 99-7-39.

RESEARCH REFERENCES

Am. Jur.
60A Am. Jur. 2d, Perjury § 61.

CHAPTER 9.

PROCESS

Sec.
99-9-1. Capias or alias issued for arrest on indictment.
99-9-3. Corporations; summons issued on indictment; execution on judgment.
99-9-5. Corporations; summons issued to other counties.
99-9-7. Corporations; order to appear mailed and published if corporation not found; appearance and plea entered; execution.
99-9-9. Corporations; proceeding before justice of the peace.
99-9-11. Subpoenas for witnesses.
99-9-13. Issuance of subpoena for witness to give deposition for use in another state.
99-9-15. Subpoena to compel attendance of witness from nearby county during term.
99-9-17. Service of subpoena.
99-9-19. Attachment for non-appearing subpoenaed witness.
99-9-21. Subpoenaed witness to attend until discharged; scire facias for defaulters.
99-9-23. Witness subpoenaed in vacation to appear before grand jury.
99-9-25. Attachment of subpoenaed witnesses failing to appear before grand jury.
99-9-27. Uniform witness attendance law; short title.
99-9-29. Definitions.
99-9-31. Summoning witnesses in this state to testify in another state.
99-9-33. Witness from another state summoned to testify in this state.
99-9-35. Exemption from arrest and service of process.
99-9-37. Uniformity of interpretation.

§ 99-9-1. Capias or alias issued for arrest on indictment.

The process for arrest on an indictment shall be a capias, which shall be issued immediately on the return of the indictment into court, and made returnable instanter, unless otherwise ordered by the court, and if the capias be not returned executed, the clerk shall issue an alias, returnable to the next term, without an order for that purpose.

HISTORY: Codes, 1857, ch. 64, art. 284; 1871, § 2784; 1880, § 3018; 1892, § 1366; 1906, § 1438; Hemingway's 1917, § 1195; 1930, § 1218; 1942, § 2461.

RESEARCH REFERENCES

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Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (LexisNexis Law Enforcement).

Pretrial Motions in Criminal Prosecutions, 4th Edition (LexisNexis).

JUDICIAL DECISIONS

1. In general.

The term "process," within the meaning of the section stipulating that all process, except where otherwise provided, shall be issued and signed by the clerk of the court, includes the ordinary warrant for arrest, and certainly so when taken in connection with this section [Code 1942, § 2461] opening with the sentence that "the process for arrest on an indictment shall be a capias," etc. Cooper v. State, 193 Miss. 672, 10 So. 2d 764, 1942 Miss. LEXIS 156 (Miss. 1942).

The fact that a capias for arrest on a misdemeanor charge was issued on the affidavit of the county prosecuting attorney, by the clerk of the county court without any order therefor from the county judge, did not render it invalid, or avoid jurisdiction, by the court over the person of the defendant, since, inasmuch as the affidavit of the county prosecuting attorney took the place of an indictment in the circuit court, the process on the charge of misdemeanor so made was a capias to be issued by the clerk of the county court. Cooper v. State, 193 Miss. 672, 10 So. 2d 764, 1942 Miss. LEXIS 156 (Miss. 1942).

§ 99-9-3. Corporations; summons issued on indictment; execution on judgment.

When an indictment shall be found against a corporation, a summons shall be issued against it, by its corporate name, to appear and answer the indictment, which summons may be executed as a summons against a corporation in a civil suit; and upon the summons being returned executed, the corporation shall be considered in court, and appearing to the indictment, and the court shall, unless the defendant do so of its own accord, cause an appearance for it to be entered of record; and such proceedings may then be had thereon as if the corporation had appeared and pleaded thereto; and if the corporation be convicted on the indictment, the court may pass judgment thereon, and cause process of execution to be issued against the goods and chattels, lands and tenements of the corporation for the amount of the fine and costs which may be awarded against it, as on a judgment in a civil suit; and the sheriff shall proceed to sell the goods and chattels, and lands and tenements of the corporation on the execution as on an execution issuing against a corporation in a civil suit.

HISTORY: Codes, 1857, ch. 64, art. 269; 1871, § 2769; 1880, § 3019; 1892, § 1367; 1906, § 1439; Hemingway's 1917, § 1196; 1930, § 1219; 1942, § 2462.

Cross References — Service upon corporate defendant in civil action and effect thereof, see § 13-3-49.

RESEARCH REFERENCES

Am. Jur.
62B Am. Jur. 2d, Process § 129.

§ 99-9-5. Corporations; summons issued to other counties.

If the summons be returned not executed, and the officer shall make affidavit that he hath made diligent inquiry and cannot ascertain any place of business of the corporation in the county, or the name of any officer of the corporation, resident in the county in which such indictment shall have been found, upon whom the summons could be executed, then the court shall make an order directing a summons to issue to any other county of the state in which the defendant corporation may be served, or the summons may be issued in the first instance without a precedent order of the court, and its service shall be as effectual as if served in the county where the indictment is found.

HISTORY: Codes, 1857, ch. 64, art. 270; 1871, § 2770; 1880, § 3020; 1892, § 1368; 1906, § 1440; Hemingway's 1917, § 1197; 1930, § 1220; 1942, § 2463.

Cross References — Service upon corporate defendant in civil action and effect thereof, see § 13-3-49.

§ 99-9-7. Corporations; order to appear mailed and published if corporation not found; appearance and plea entered; execution.

If it be made known to the court, by affidavit of any credible person, as required in suits in chancery against non-residents, that the defendant corporation is non-resident, or cannot be found in this state, it shall order said corporation to cause its appearance to be entered, and to plead to the indictment, on or before the first day of the next term of the court, a copy of which order shall, within thirty days, be forwarded by mail to the corporation, postage paid, by the clerk of the court, if the post-office address be made known by the affidavit; and it shall also be published for three weeks in one of the public newspapers printed in this state, as the court may direct. If the corporation shall not appear within the time limited by such order, or within such further time as the court shall appoint, then, on due proof of the mailing and publication, or of the publication, the court shall order the clerk to enter an appearance and plea of not guilty for said corporation, and, thereupon, further proceedings may be had on such indictment as if the corporation had appeared and pleaded thereto. In case of conviction, execution may be issued and proceedings had thereon as described in section 99-9-5.

HISTORY: Codes, 1857, ch. 64, art. 270; 1871, § 2770; 1880, § 3020; 1892, § 1369; 1906, § 1441; Hemingway's 1917, § 1198; 1930, § 1221; 1942, § 2464.

Cross References — Service upon corporate defendant in civil action and effect thereof, see § 13-3-49.

§ 99-9-9. Corporations; proceeding before justice of the peace.

Process and proceedings like those described in Sections 99-9-3 through 99-9-7 may be had before justices of the peace in a prosecution or proceeding against a corporation for any offense cognizable before a justice of the peace. In case publication be necessary, the day of appearance may be fixed for such time as will allow the order to be published for the required period.

HISTORY: Codes, 1857, ch. 64, art. 271; 1871, § 2771; 1880, § 3021; 1892, § 1370; 1906, § 1442; Hemingway's 1917, § 1199; 1930, § 1222; 1942, § 2465.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 99-9-11. Subpoenas for witnesses.

The first process, in all criminal causes, and in all courts, to compel the attendance of a witness, shall be a subpoena, directed to the sheriff or to some proper officer of the county where the witness may reside, stating the time and place for the appearance of the witness, the parties to the cause, and the party at whose instance the witness is subpoenaed. The names of the witnesses, if there be not exceeding six of them, residing in the same county, shall be inserted in the same subpoena.

HISTORY: Codes, Hutchinson's 1848, ch. 60, art. 1(102); 1857, ch. 61, art. 194; 1871, § 761; 1880, § 1586; 1892, § 3449; 1906, § 3948; Hemingway's 1917, § 2955; 1930, § 3001; 1942, § 1883.

Cross References — Power of chancery court to issue subpoenas for witnesses, see § 9-5-85.

Issuance of subpoenas by justice of the peace, see § 11-9-115.

Issuance of subpoenas in habeas corpus proceedings, see § 11-43-49.

Subpoenas for witnesses in civil actions, see § 13-3-93.

Power of grand jury foreman to issue subpoenas for witnesses, see § 13-5-63.

Witness fees generally, see § 25-7-47.

Service of subpoena, see § 99-9-17.

Issuance of subpoenas by conservators of peace, see § 99-15-9.

Right to subpoena witnesses under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-23.

Subpoenas, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 2.01.

Expert witnesses, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 3.01.

JUDICIAL DECISIONS

1. In general.

Mother failed to prove by a preponderance of the evidence under Miss. Code Ann. § 93-9-9(1) that it was in her child's best interest that her surname not be the father's, as the only evidence offered by the mother that the child should not have the father's surname was possible embarrassment and confusion for the mother and child to have different names. Rice v. Merkich, 34 So. 3d 555, 2010 Miss. LEXIS 230 (Miss. 2010).

Where counsel is unable to locate witnesses, use of subpoenas covers 2 purposes; subpoenas utilize services of state in locating witness for interview and also secure witness' attendance at court. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

Failure of counsel to issue subpoenas even for friendly, favorable witnesses is perilous, because if for some reason witness fails to appear, prerequisite for continuance is that he or she is either under process or reasonable effort has been made to serve him or her with subpoena. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

In order to be entitled to continuance because of absent witness, counsel must demonstrate to court that he or she "has used due diligence" to secure witness' presence; embraced therein is requirement that counsel has made timely effort to place absent witness under subpoena. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

RESEARCH REFERENCES

Am. Jur.

81 Am. Jur. 2d, Witnesses §§ 8, 9 et seq.

21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:703, (subpoena issued by court).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 62-64, (subpoena).

CJS.

98 C.J.S., Witnesses §§ 21, 25 et seq.

Lawyers' Edition.

Accused's right, under Federal Constitution's Sixth Amendment, to compulsory process for obtaining witnesses in accused's favor–Supreme Court cases. 98 L. Ed. 2d 1074.

§ 99-9-13. Issuance of subpoena for witness to give deposition for use in another state.

Any commissioner or other person appointed, or to whom a commission may be directed, by any court without the limits of this state, to take the deposition of any witness residing or being in this state, shall have power to issue subpoenas for the witness to be examined, returnable at such time and place as the commissioner or other person may appoint.

HISTORY: Codes, 1857, ch. 61, art. 195; 1871, § 763; 1880, § 1587; 1892, § 3451; 1906, § 3950; Hemingway's 1917, § 2957; 1930, § 3003; 1942, § 1885.

§ 99-9-15. Subpoena to compel attendance of witness from nearby county during term.

If, during the session of any circuit court, there shall be wanted in any case or matter before the court, or before the grand jury, a witness who resides or may be found in any county within the state, and within one hundred (100) miles of the place where the court is being held, such court may order a subpoena or attachment for such witness, directed to the sheriff of the county in which the court is being held. The sheriff shall execute the process according to its command, in the county where such witness may be found, and the service shall be as valid as if effected in the county in which the court is being held. The court may, however, appoint some person not an officer to execute and return such process, whose action in executing it shall be as lawful as if done by the sheriff, and who shall be entitled to the same fees therefor as the sheriff would be entitled to for executing the process.

HISTORY: Codes, 1880, § 1594; 1892, § 3452; 1906, § 3951; Hemingway's 1917, § 2958; 1930, § 3004; 1942, § 1886; Laws, 1936, ch. 250.

Cross References — Fees of sheriff generally, see § 25-7-19.

RESEARCH REFERENCES

Am. Jur.

81 Am. Jur. 2d, Witnesses §§ 8, 9 et seq.

21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:671, (application for attachment of witness to compel attendance).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Form 13, (application for attachment of witness to compel attendance to testify).

CJS.

98 C.J.S., Witnesses §§ 21, 25 et seq.

§ 99-9-17. Service of subpoena.

Subpoenas shall be served personally as a summons is required to be served, and the person so subpoenaed shall appear.

HISTORY: Codes, 1857, ch. 61, art. 196; 1871, § 764; 1880, § 1588; 1892, § 3453; 1906, § 3952; Hemingway's 1917, § 2959; 1930, § 3005; 1942, § 1887.

JUDICIAL DECISIONS

1. In general.

Where counsel is unable to locate witnesses, use of subpoenas covers 2 purposes; subpoenas utilize services of state in locating witness for interview and also secure witness' attendance at court. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

RESEARCH REFERENCES

Am. Jur.

81 Am. Jur. 2d, Witnesses § 12.

21 Am. Jur. Pl & Pr Forms, Witnesses, Forms 21:716-21:723, (affidavit of service of subpoena).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 74-81, (affidavit of service of subpoena).

CJS.

98 C.J.S., Witnesses §§ 26-29.

§ 99-9-19. Attachment for non-appearing subpoenaed witness.

If any person subpoenaed as a witness shall fail to appear and attend as required, an attachment shall be issued by order of the court or other authority before which he was subpoenaed to appear, returnable at such time as the court or authority may appoint. The court or authority shall, on ordering the attachment, direct whether the witness shall enter into bond for his appearance, and in what sum, and whether with or without sureties, which bond the sheriff, or other officer by whom the attachment is executed, is authorized to take, payable to the state. In case the witness shall appear in answer to the attachment, the court may discharge him therefrom, on good cause shown, or may require him to enter into recognizance or bond for his appearance until discharged, to testify in the cause. In case the witness shall not appear, in pursuance of his recognizance or bond, the same proceedings shall be had as upon the forfeiture of a recognizance in a criminal case.

HISTORY: Codes, Hutchinson's 1848, ch. 60, art. 1(121); 1857, ch. 61, art. 197; 1871, § 765; 1880, § 1589; 1892, § 3454; 1906, § 3935; Hemingway's 1917, § 2960; 1930, § 3006; 1942, § 1888.

Cross References — Form of attachment of witness issued by justice of the peace, see § 11-9-121.

Attachment of defaulting witness in habeas corpus proceeding, see § 11-43-49.

Another section derived from same 1942 code section, see § 13-3-103.

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:737, (attachment of witness for failure to obey subpoena).

25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 96, 97, (attachment of witness for failure to obey subpoena).

CJS.

98 C.J.S., Witnesses §§ 57, 58.

§ 99-9-21. Subpoenaed witness to attend until discharged; scire facias for defaulters.

Every witness subpoenaed in any criminal case, shall attend, from day to day, and from term to term without further notice, until discharged by the court or by the party at whose instance he was subpoenaed, and in default thereof he shall be fined by the court not more than five hundred dollars, and a scire facias shall issue thereon, requiring him to appear at the next term of the court, to show cause why the fine should not be made absolute. If cause be not then shown, the fine shall be made final. In criminal cases, the court may cause the witnesses on either side to be bound by bond or recognizance to appear and testify until discharged.

HISTORY: Codes, Hutchinson's 1848, ch. 60, art. 1(103, 105); 1857, ch. 61, arts. 196, 198; 1871, § 766; 1880, §§ 1590, 1591, 1592; 1892, § 3455; 1906, § 3954; Hemingway's 1917, § 2961; 1930, § 3007; 1942, § 1889.

JUDICIAL DECISIONS

1. In general.

Where counsel is unable to locate witnesses, use of subpoenas covers 2 purposes; subpoenas utilize services of state in locating witness for interview and also secure witness' attendance at court. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

Where the witness's deliberate and wilful refusal to appear and testify constituted constructive contempt, the power of the court to punish this contempt was not limited by the terms of this statute. Buskirk v. State, 321 So. 2d 295, 1975 Miss. LEXIS 1524 (Miss. 1975).

After the state rested its case in a prosecution for assault and battery with an intent to kill, the district attorney had authority to release a witness subpoenaed by the state, who had not been subpoenaed by the defendant. Nicholson v. State, 230 Miss. 267, 92 So. 2d 654, 1957 Miss. LEXIS 366 (Miss. 1957).

RESEARCH REFERENCES

Am. Jur.
21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:735, (scire facias on judgment against witness failing to obey subpoena).
25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Form 93, (scire facias on judgment against witness failing to obey subpoena).

§ 99-9-23. Witness subpoenaed in vacation to appear before grand jury.

Any district attorney or conservator of the peace may apply to the clerk of the circuit court in vacation for writs of subpoena for any witness to attend before the grand jury. It shall be the duty of the clerk to issue all subpoenas thus applied for, and it shall be the duty of all witnesses subpoenaed to attend in obedience to the command of such subpoena. If such witnesses fail to appear, the foreman of the grand jury may apply for and obtain an attachment, as in other cases of defaulting witnesses, and such witnesses shall be liable to all the penalties to which any defaulting witness is subject.

HISTORY: Codes, 1880, § 1678; 1892, § 3456; 1906, § 3955; Hemingway's 1917, § 2962; 1930, § 3008; 1942, § 1890; Laws, 1983, ch. 499, § 27, eff from and after July 1, 1983.

Cross References — Power of grand jury foreman to issue subpoenas for witnesses, see § 13-5-63.
Grand jury convening in vacation, see MRCrP 13.1, 13.3.

RESEARCH REFERENCES

Am. Jur.
81 Am. Jur. 2d, Witnesses §§ 8, 9 et seq.
21 Am. Jur. Pl & Pr Forms, Witnesses, Form 21:704, (subpoena issued by court to appear before grand jury).
25 Am. Jur. Pl & Pr Forms (Rev), Witnesses, Forms 63, 64 (subpoena to appear before grand jury).
38 Am. Jur. Trials, Representing the Grand Jury Target Witness, §§ 1 et seq.

CJS.
98 C.J.S., Witnesses §§ 21, 25 et seq., 57, 58.

§ 99-9-25. Attachment of subpoenaed witnesses failing to appear before grand jury.

In all cases where process to bring witnesses before the grand jury shall be executed, and the witness shall fail to attend, the clerk shall, on the order of the judge or application of the district attorney or any member of the grand jury, issue an attachment for such witness, returnable immediately, or, if the court shall so direct, to the next term. Bond may be required, and fine imposed and proceedings had thereon as in other cases of defaulting witnesses.

HISTORY: Codes, 1880, § 1679; 1892, § 3457; 1906, § 3956; Hemingway's 1917, § 2963; 1930, § 3009; 1942, § 1891.

Cross References — Power of grand jury foreman to issue subpoenas for witnesses, see § 13-5-63.

RESEARCH REFERENCES

ALR.
Privilege against self-incrimination as to testimony before grand jury. 38 A.L.R.2d 225.

CJS.
98 C.J.S., Witnesses §§ 57, 58.

§ 99-9-27. Uniform witness attendance law; short title.

Sections 99-9-27 through 99-9-35 may be cited as "uniform law to secure the attendance of witnesses from without the state in criminal cases."

HISTORY: Codes, 1942, § 1892; Laws, 1938, ch. 261.

JUDICIAL DECISIONS

1. In general.
A conviction for selling three capsules of heroin would be reversed where the state had agreed to have an essential out-of-state witness present and failed to do so, even though the witness could have been subpoenaed under Uniform Witness Act. Sullivan v. State, 364 So. 2d 277, 1978 Miss. LEXIS 2218 (Miss. 1978).

RESEARCH REFERENCES

ALR.
Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

Am. Jur.
81 Am. Jur. 2d, Witnesses § 7.

CJS.
98 C.J.S., Witnesses §§ 15, 17, 18, 19.

§ 99-9-29. Definitions.

"Witness" as used in Sections 99-9-27 through 99-9-35 shall include a person whose testimony is relevant and material and desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

"State" as used in Sections 99-9-27 through 99-9-35 shall include any territory of the United States and the District of Columbia.

HISTORY: Codes, 1942, § 1893; Laws, 1938, ch. 261.

RESEARCH REFERENCES

Am. Jur.
81 Am. Jur. 2d, Witnesses § 7.

CJS.
98 C.J.S., Witnesses §§ 15, 17, 18, 19.

§ 99-9-31. Summoning witnesses in this state to testify in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing, the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where the grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing, and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the summoned witness, after being paid or tendered by some properly authorized person, the sum of ten ($.10) cents a mile for each mile and five ($5.00) dollars for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

HISTORY: Codes, 1942, § 1894; Laws, 1938, ch. 261.

Cross References — Witness from another state summoned to testify in this state, see § 99-9-33.

RESEARCH REFERENCES

ALR.
Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

Am. Jur.
81 Am. Jur. 2d, Witnesses § 7.

CJS.
98 C.J.S., Witnesses §§ 15, 17, 18, 19.

§ 99-9-33. Witness from another state summoned to testify in this state.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness shall be required. This certificate shall be presented to a judge of a court of record in the county or parish in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him, and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

If the witness is summoned to attend and testify in this state, he shall be tendered the sum of ten ($.10) cents a mile for each mile and five ($5.00) dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

HISTORY: Codes, 1942, § 1895; Laws, 1938, ch. 261.

Cross References — Witness in this state summoned to testify in another state, see § 99-9-31.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Allowance of travel and per diem fees.

1. In general.

Witness who traveled from out-of-state pursuant to a subpoena was not overcompensated. Ronk v. State, 172 So. 3d 1112, 2015 Miss. LEXIS 219 (Miss. 2015), cert. denied, — U.S. —, 136 S. Ct. 1657, 194 L. Ed. 2d 773, 2016 U.S. LEXIS 2643 (U.S. 2016), in part, — So. 3d —, 2016 Miss. LEXIS 493 (Miss. 2016).

There is no method by which an out-of-state witness can be paid, and the trial court is without authority to force a witness for the defense to leave a foreign state to testify in Mississippi. Chandler v. State, 272 So. 2d 641, 1973 Miss. LEXIS 1537 (Miss. 1973).

Code 1942, § 1895 does not authorize a court to procure the attendance and testimony of witnesses for an accused at public expense, and an accused is not deprived of his constitutional right to compulsory process and to due process of law and equal protection of the laws by the refusal of a court to order an allowance for the payment of witnesses sought by the defendant to be subpoenaed from another state pursuant to such section. Diddlemeyer v. State, 234 So. 2d 292, 1970 Miss. LEXIS 1402 (Miss.), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157, 1970 U.S. LEXIS 471 (U.S. 1970).

In a criminal prosecution, where the trial court was without authority to compel the attendance of witnesses requested by the defendant under any circumstances, so long as they were outside the state, the court's denial of compulsory process for the attendance of three witnesses confined in penitentiaries in other states, and a fourth witness who resided out of the state, did not constitute a denial of due process or equal protection. Diddlemeyer v. State, 234 So. 2d 292, 1970 Miss. LEXIS 1402 (Miss.), cert. denied, 400 U.S. 917, 91 S. Ct. 177, 27 L. Ed. 2d 157, 1970 U.S. LEXIS 471 (U.S. 1970).

2. Allowance of travel and per diem fees.

Although defendant alleged that had his witnesses been provided a fair amount of funds to secure their livelihood during the trial that they would have been present and the jury would not have convicted him, defendant did not detail what fair amount of funds would have induced the witnesses to appear at trial, and the circuit court followed this statute in providing each of defendant's purported alibi witnesses the allowance for travel and per diem fees; to the extent defendant's witnesses failed to appear in his defense, their non-appearance was not the result of any error by the circuit court. Gardner v. State, — So. 3d —, 2019 Miss. App. LEXIS 593 (Miss. Ct. App. Dec. 10, 2019).

RESEARCH REFERENCES

ALR.

Uniform Act to secure attendance of witnesses from without the state in criminal proceedings. 44 A.L.R.2d 732.

Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of subpoena duces tecum. 7 A.L.R.4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

Am. Jur.

81 Am. Jur. 2d, Witnesses § 7.

CJS.
98 C.J.S., Witnesses §§ 15, 17, 18, 19.

§ 99-9-35. Exemption from arrest and service of process.

If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not, while in this state pursuant to such summons or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons or order to attend and testify in that state or while returning therefrom, he shall not, while so passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons or order.

HISTORY: Codes, 1942, § 1896; Laws, 1938, ch. 261.

RESEARCH REFERENCES

ALR.
Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 12 A.L.R.4th 771.

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 A.L.R.4th 990.

Am. Jur.
81 Am. Jur. 2d, Witnesses § 7.

CJS.
98 C.J.S., Witnesses §§ 15, 17, 18, 19.

§ 99-9-37. Uniformity of interpretation.

Sections 99-9-27 to 99-9-35 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact them.

HISTORY: Codes, 1942, § 1897; Laws, 1938, ch. 261.

CHAPTER 11.

JURISDICTION AND VENUE

Sec.

99-11-1. Jurisdiction of crimes generally.
99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury [Subsection (2) repealed effective July 1, 2024].
99-11-5. Extent of criminal jurisdiction of State of Mississippi.
99-11-7. Concurrent jurisdiction with Arkansas.
99-11-9. Jurisdiction of paternity proceedings.
99-11-11. Embezzlement.
99-11-13. Kidnapping.
99-11-15. Offenses commenced out of and consummated in state.
99-11-17. Offenses commenced in and consummated out of state.
99-11-19. Offenses committed partly in one county and partly in another.
99-11-21. Occurrence in one jurisdiction causing death in another.
99-11-23. Stolen property carried into state or carried from one county to another.
99-11-25. Aiding, encouraging or causing commission of crime within state by person while out of state.
99-11-27. Former acquittal or conviction in another jurisdiction.
99-11-29. Acquittal for variance between indictment and proof or on exception to form.
99-11-31. Acquittal on the merits.
99-11-33. Acquittal or conviction by justice of the peace for misdemeanor not to bar prosecution for felony.
99-11-35. No acquittal for defects of form.
99-11-37. Cognizance and jurisdiction of crimes committed in particular district in Harrison County or Hinds County.
99-11-39. Transmittal of records on change of venue or transfer or removal of trial in Harrison County or Hinds County.

§ 99-11-1. Jurisdiction of crimes generally.

The several courts of justice organized under the constitution and laws of this state, shall possess the sole and exclusive jurisdiction of trying and punishing all persons in the manner prescribed by law, for crimes and offenses committed in this state, except such as are exclusively cognizable by the courts deriving their jurisdiction from the constitution and laws of the United States.

HISTORY: Codes, 1857, ch. 64, art. 240; 1871, § 2750; 1880, § 2990; 1892, § 1328; 1906, § 1400; Hemingway's 1917, § 1148; 1930, § 1175; 1942, § 2418.

Cross References — Definition of "offense," see § 1-3-37.

Concession of jurisdiction to land acquired by United States, see §§ 3-5-5, 3-5-9.

Jurisdiction of circuit court generally, see § 9-7-81.

Jurisdiction of county court generally, see § 9-9-1.

Jurisdiction of justices of the peace in civil cases, see § 9-11-9.

Venue of civil actions generally, see §§ 11-11-1 et seq.

Misdemeanors under state penal laws being criminal offenses against municipal corporations, see § 21-13-19.

County in which motions may be made or a guilty plea entered with respect to criminal cases in circuit courts, see § 99-15-24.

Jurisdiction of justices of the peace over criminal case, see § 99-33-1.

Jurisdiction under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-7.

Civil and criminal procedure in federal district courts sitting in Mississippi, see Uniform Local Rules of U.S. District Courts for Northern and Southern Districts of Mississippi.

JUDICIAL DECISIONS

1. In general.

No jeopardy attached upon the impaneling and swearing in of the first jury, since the circuit court was without jurisdiction to try the minor defendant for manslaughter, and she was not placed in jeopardy for a second time by her subsequent trial for murder and conviction of manslaughter, after she had been certified by the youth court to the circuit court for trial as an adult. Butler v. State, 489 So. 2d 1093, 1986 Miss. LEXIS 2507 (Miss. 1986).

Although the state had given its consent for the United States to purchase certain of its lands for the use and benefit of Choctaw Indians, it did not give its consent for the United States to acquire civil and criminal jurisdiction over the land or the Indians and it thereby retained jurisdiction for its own courts. Tubby v. State, 327 So. 2d 272, 1976 Miss. LEXIS 1780 (Miss. 1976).

Circuit courts have all the common-law power of English criminal courts to examine, try and deliver every prisoner who is in jail or under charge within the jurisdiction of the court. State v. Thornhill, 251 Miss. 718, 171 So. 2d 308, 1965 Miss. LEXIS 896 (Miss. 1965).

RESEARCH REFERENCES

ALR.

What is proper venue under Rule 18 of the Federal Rules of Criminal Procedure for offense of bail jumping. 52 A.L.R. Fed. 901.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 431-434 et seq., 461 et seq.

CJS.

22 C.J.S., Criminal Law §§ 141 et seq.

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§ 99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury [Subsection (2) repealed effective July 1, 2024].

(1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

(2) The provisions of subsection (1) of this section shall not apply to indictments returned by a state grand jury. The venue of trials for indictments returned by a state grand jury shall be as provided by the State Grand Jury Act. This subsection shall stand repealed from and after July 1, 2024.

HISTORY: Codes, 1857, ch. 64, art. 241; 1871, § 2751; 1880, § 2991; 1892, § 1329; 1906, § 1401; Hemingway's 1917, § 1149; 1930, § 1176; 1942, § 2419; Laws, 1981, ch. 471, § 54; Laws, 1982, ch. 423, § 28; Laws, 1993, ch. 352, § 1; Laws, 1993, ch. 553, § 22; Laws, 1998, ch. 382, § 26; Laws, 1999, ch. 480, § 26; Laws, 2002, ch. 471, § 26; Laws, 2005, ch. 506, § 1; Laws, 2011, ch. 337, § 26; Laws, 2014, ch. 526, § 26, eff from and after July 1, 2014.

Cross References — Criminal accused's right to trial in county where offense was committed, see Miss. Const. Art. 3, § 26.

State Grand Jury Act, see §§ 13-7-1 et seq.

Offenses committed partly in one county and partly in another, see § 99-11-19.

Occurrence in one jurisdiction causing death in another, see § 99-11-21.

Stolen property carried into state or carried from one county to another, see § 99-11-23.

County in which motions may be made or a guilty plea entered with respect to criminal cases in circuit courts, see § 99-15-24.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Proof of venue, generally.
3. —Judicial notice.
4. —Jurisdiction of circuit court.
5. —Jurisdiction of county court.
6. —Rebuttable presumption.
7. Raising question as to venue on appeal.
8. Transfer of venue.

1. In general.

A murder defendant was subject to jurisdiction in either the first or second judicial district of a county where the victim's abduction began in the second judicial district while the slaying occurred in the first judicial district. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

Venue for murder prosecution is proper in county in which body of victim is found. Hickson v. State, 472 So. 2d 379, 1985 Miss. LEXIS 2132 (Miss. 1985).

A convict charged with escaping and breaking prison must be indicted and tried in the county where the crime is alleged to have been committed, unless the venue is changed as provided by law, and if the alleged offense occurred in a county other than the one in which the state penitentiary is located an indictment returned in the county of the penitentiary's situs must be quashed. Everitt v. Jack, 192 So. 2d 698, 1966 Miss. LEXIS 1266 (Miss. 1966).

In matters of criminal jurisdiction, each judicial district must be treated as a separate county. Passons v. State, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273

(Miss. 1950), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

In a county having two judicial districts an indictment for grand larceny must charge the district in which the crime was committed. Evans v. State, 144 Miss. 1, 108 So. 725, 1926 Miss. LEXIS 334 (Miss. 1926).

Laws 1910, ch. 141 [Code 1942, §§ 2420, 2421], seems to engraft an exception to this statute but does not violate Miss. Const. Art. 3, § 26. State v. Cunningham, 102 Miss. 237, 59 So. 76, 1912 Miss. LEXIS 49 (Miss. 1912).

A defendant must be indicted and tried in the judicial district of the county in which the offense was committed. Isabel v. State, 101 Miss. 371, 58 So. 1, 1912 Miss. LEXIS 2 (Miss. 1912).

Where an offense is committed and before any prosecution is begun a new county is created including the territory where the crime was enacted, jurisdiction can be properly exercised in the new county. Murrah v. State, 51 Miss. 675, 1875 Miss. LEXIS 94 (Miss. 1875).

2. Proof of venue, generally.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351, 2011 Miss. App. LEXIS 364 (Miss. Ct. App. 2011).

In a case where defendant was pursued by an officer for speeding on the wrong side of the road, venue in that county was proper under Miss. Code Ann. § 99-11-3(1), even though he was stopped in another county, because that was where the offense was first committed. Ouzts v. State, 947 So. 2d 1005, 2006 Miss. App. LEXIS 698 (Miss. Ct. App. 2006).

In defendant's manslaughter case, venue was properly established because the evidence showed that defendant shot the victim on or near the Lobutcha Creek Bridge, near the Leake County-Attala County line, defendant placed her body in the trunk of his car, drove northward, and left her body in Attala County. McBride v. State, 934 So. 2d 1033, 2006 Miss. App. LEXIS 539 (Miss. Ct. App. 2006).

In a prosecution for murder by the defendant of her own infant, evidence was sufficient to establish venue where an officer testified that the defendant gave him a statement in which she indicated that she was returning from a certain city on a particular highway and had just passed a specific exit when her baby began to have trouble breathing; although it was a close call, a jury was properly permitted to disbelieve her statement for the purposes of determining guilt, while nevertheless using the statement as a basis for establishing venue. Hill v. State, 797 So. 2d 914, 2001 Miss. LEXIS 68 (Miss. 2001).

Evidence that the responding police officer was with the Clarksdale Police Department provided the necessary evidence of proper venue in Coahama County, especially where venue was not a contested fact at trial. Thomas v. State, 784 So. 2d 247, 2000 Miss. App. LEXIS 577 (Miss. Ct. App. 2000).

In a prosecution for "headlighting" deer, the evidence was sufficient to establish venue, even though there was insufficient evidence to establish venue in the State's case-in-chief, where rebuttal testimony by the State sufficiently proved venue, and there was no surrebuttal by the defendant to the contrary. Smith v. State, 646 So. 2d 538, 1994 Miss. LEXIS 575 (Miss. 1994).

Venue of a crime can be proved by circumstantial evidence as well as direct evidence. Sanders v. State, 286 So. 2d 825, 1973 Miss. LEXIS 1325 (Miss. 1973).

The state failed to prove venue at a trial for assault and battery with intent to kill and murder, where it produced a record showing that the assault took place within a few feet of an automobile parked on a particular college campus, but did not show that the named college was located in a specific county or even within the state. Jackson v. State, 246 So. 2d 553, 1971 Miss. LEXIS 1422 (Miss. 1971).

In a criminal prosecution, venue is not proved by a witness who testifies that he guesses venue is in a certain named county. Turner v. State, 220 So. 2d 295, 1969 Miss. LEXIS 1449 (Miss.), cert. denied, 396 U.S. 834, 90 S. Ct. 92, 24 L. Ed. 2d 85, 1969 U.S. LEXIS 930 (U.S. 1969).

In a homicide prosecution, where a state's witness testified that he guessed that the crime was committed in Jackson County and, after an objection by the defense counsel, stated positively that the crime occurred in Jackson County, and where this was the only evidence offered as to venue by the state, the correction was properly permitted and the evidence was sufficient to meet the burden placed on the state to establish venue. Turner v. State, 220 So. 2d 295, 1969 Miss. LEXIS 1449 (Miss.), cert. denied, 396 U.S. 834, 90 S. Ct. 92, 24 L. Ed. 2d 85, 1969 U.S. LEXIS 930 (U.S. 1969).

The affidavit for a search warrant and the search warrant are admissible to show only that the search was lawful, and do not constitute any proof of venue. Clark v. State, 230 Miss. 143, 92 So. 2d 452, 1957 Miss. LEXIS 354 (Miss. 1957).

This section [Code 1942, § 2419] eliminates the requirement that proof of venue be beyond a reasonable doubt in cases where there is a conflict in evidence as to which of the two or more counties or districts in Mississippi is the place of the offense, but it has no application where the question is whether or not the alleged criminal act was committed in Mississippi. Presley v. State, 217 Miss. 112, 63 So. 2d 551, 1953 Miss. LEXIS 415 (Miss. 1953).

Venue of crime was established as being in first judicial district of Jones County, Mississippi, by evidence showing that decedent was last seen alive by accused in Jones County, near the place where his body was found in same county, and that he had received a blow on head breaking skull, small fragments of which were lying on the ground. Poore v. State, 205 Miss. 528, 37 So. 2d 3, 1948 Miss. LEXIS 218 (Miss. 1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084, 1949 U.S. LEXIS 2670 (U.S. 1949).

Venue of crime may be shown by circumstantial evidence. Holloway v. State, 199 Miss. 356, 24 So. 2d 857, 1946 Miss. LEXIS 203 (Miss. 1946); Poore v. State, 205 Miss. 528, 37 So. 2d 3, 1948 Miss. LEXIS 218 (Miss. 1948), cert. denied, 336 U.S. 922, 69 S. Ct. 656, 93 L. Ed. 1084, 1949 U.S. LEXIS 2670 (U.S. 1949).

On proof of venue in the trial of a case even if the evidence leaves the venue in doubt the supreme court is precluded from reversing the case. Hill v. State, 112 Miss. 375, 73 So. 66, 1916 Miss. LEXIS 121 (Miss. 1916).

Under this section [Code 1942, § 2419] there must be proof where the offense was committed, if it is near the county line and the proof is doubtful as to which county it was committed in, the doubt will not avail to acquit the defendant. Isabel v. State, 101 Miss. 371, 58 So. 1, 1912 Miss. LEXIS 2 (Miss. 1912).

3. —Judicial notice.

In a driving under the influence case, the State established the court's jurisdiction; although the arresting officer did not testify that the events occurred in the relevant city and county, there was direct and circumstantial evidence to show the crimes occurred there, and the court properly took judicial notice under Miss. R. Evid. 201(b) that the area where defendant was stopped was within the city. Russell v. State, 126 So. 3d 145, 2013 Miss. App. LEXIS 786 (Miss. Ct. App. 2013).

Appellate court affirmed defendant's conviction despite defendant's claims that venue was never proved because the victim testified that the assaults occurred while defendant was living with the victim and her mother, all of the homes that they lived in during the relevant time, although in different cities, were within one specific county, venue of a criminal offense is in the county where the crime was committed, and the appellate court could take judicial notice on appeal that a certain city was located within a particular county. Hensley v. State, 912 So. 2d 1083, 2005 Miss. App. LEXIS 746 (Miss. Ct. App. 2005).

Judicial notice may be taken that a certain street is in a specific county, at least if the street has a sufficiently unusual name. Thomas v. State, 784 So. 2d 247, 2000 Miss. App. LEXIS 577 (Miss. Ct. App. 2000).

Venue was not established by the court taking judicial notice of the fact that the college at which the alleged assault took place was located in a particular county, for it is a dangerous practice to invoke the doctrine of judicial notice in criminal cases, and before judicial notice can be available as to matters of venue it must be a matter of such general or common knowledge that every man may know it. Jackson v. State, 246 So. 2d 553, 1971 Miss. LEXIS 1422 (Miss. 1971).

While the supreme court may take judicial notice that a town or city is in a certain county, it will not take judicial notice of the supervisor's district in which a town or city is located. Clark v. State, 230 Miss. 143, 92 So. 2d 452, 1957 Miss. LEXIS 354 (Miss. 1957).

4. —Jurisdiction of circuit court.

Defendant's convictions for capital murder during the commission of a robbery were proper because the State satisfactorily established venue in Forrest County since sufficient evidence was presented to allow the jury to conclude beyond a reasonable doubt that the crimes had taken place, at least in part, in Forrest County, Miss. Code Ann. § 99-11-3(1). Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

Where a county circuit court acquired authority to proceed against the defendant when the grand jury returned indictments charging the essential elements of a criminal offense committed in the county against the defendant and served those indictments upon him, such court maintained jurisdiction to accept the defendant's guilty plea and impose an appropriate sentence. Edwards v. State, 749 So. 2d 291, 1999 Miss. App. LEXIS 555 (Miss. Ct. App. 1999).

When a criminal case originates in the justice of the peace court and is appealed to the circuit court for trial de novo, the circuit court does not have jurisdiction unless the proof shows that the offense was committed in the district where the case originated. Clark v. State, 230 Miss. 143, 92 So. 2d 452, 1957 Miss. LEXIS 354 (Miss. 1957).

Defendants were not entitled to a reversal of conviction on ground that evidence failed to show that circuit court of county had jurisdiction where offense was committed near county line but evidence was conflicting as to county in which offense was committed. Phillips v. State, 177 Miss. 370, 171 So. 24, 1936 Miss. LEXIS 275 (Miss. 1936).

5. —Jurisdiction of county court.

To confer jurisdiction on county court in misdemeanor case, state need only allege and prove crime was committed in county. Webb v. State, 158 Miss. 715, 131 So. 262, 1930 Miss. LEXIS 108 (Miss. 1930).

6. —Rebuttable presumption.

The fact that a victim was found dead in Newton County raised a rebuttable presumption that all or part of the homicide took place in Newton County, and, since the defendant failed to offer anything to rebut this presumption or make unreasonable the inference, such evidence was sufficient to undergird a finding that venue was proper in Newton County in accordance with § 99-11-3. Fairchild v. State, 459 So. 2d 793, 1984 Miss. LEXIS 1983 (Miss. 1984).

7. Raising question as to venue on appeal.

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where he attempted to burn the structure; venue was proper pursuant to U.S. Const. Art. III, § 2 cl. 3, U.S. Const. Amend. VI, and Miss. Const. Art. 3, § 26 because there was nothing conceptually outrageous or bizarre in bringing charges in the county for an attempt to burn a building in that county, Miss. Code Ann. § 99-11-3(1). Holbrook v. State, 877 So. 2d 525, 2004 Miss. App. LEXIS 23 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 865 (Miss. 2004), cert. denied, 543 U.S. 1166, 125 S. Ct. 1340, 161 L. Ed. 2d 141, 2005 U.S. LEXIS 1746 (U.S. 2005).

Although defendant claimed on appeal that he was prosecuted in the wrong county, he raised this issue for the first time on appeal, having never done so at trial; moreover, the crime was possession of a controlled substance and the evidence was that he did not obtain it at the end of the chase, but surely possessed it at the beginning, at the end, and at every point in between, so that its discovery at the point where the chase ended did not dilute the inference that he must have possessed the substance when the chase began in Oktibbeha County, Mississippi. Burnett v. State, 876 So. 2d 409, 2003 Miss. App. LEXIS 1184 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 853 (Miss. 2004).

On an appeal from a conviction in a justice of peace court for the unlawful possession of intoxicating liquor, or other misdemeanors, the state must prove in what district of the county the offense occurred; and the question of whether or not venue was proved may be raised for the first time in the supreme court. Jones v. State, 230 Miss. 887, 94 So. 2d 234, 1957 Miss. LEXIS 436 (Miss. 1957), overruled, Mattox v. State, 243 Miss. 402, 137 So. 2d 920, 1962 Miss. LEXIS 356 (Miss. 1962).

When a criminal case originates in the justice of peace court and is appealed to the circuit court for trial de novo, the circuit court does not have jurisdiction unless the proof shows that the offense was committed in the district where the case originated, and this question of venue may be raised for the first time in the supreme court. Clark v. State, 230 Miss. 143, 92 So. 2d 452, 1957 Miss. LEXIS 354 (Miss. 1957).

Failure of the state in a criminal case to prove venue is jurisdictional error and the supreme court will reverse although the point may be for the first time raised in the supreme court. Kyle v. Calhoun City, 123 Miss. 542, 86 So. 340, 1920 Miss. LEXIS 55 (Miss. 1920).

In a criminal case venue is jurisdictional and must be proved and may be raised for the first time on appeal to the supreme court. Quillen v. State, 10 Miss. 2735a, 106 Miss. 831, 64 So. 736, 1914 Miss. LEXIS 24 (Miss. 1914); Norwood v. State, 129 Miss. 813, 93 So. 354, 1922 Miss. LEXIS 92 (Miss. 1922); Slaton v. State, 134 Miss. 419, 98 So. 838, 1924 Miss. LEXIS 264 (Miss. 1924); Sullivan v. State, 136 Miss. 773, 101 So. 683, 1924 Miss. LEXIS 162 (Miss. 1924); Sandifer v. State, 136 Miss. 836, 101 So. 862, 1924 Miss. LEXIS 190 (Miss. 1924); Pickle v. State, 137 Miss. 112, 102 So. 4, 1924 Miss. LEXIS 201 (Miss. 1924); Carpenter v. State, 102 So. 184 (Miss. 1924); Monroe v. State, 104 So. 451 (Miss. 1925); Griffin v. State, 140 Miss. 175, 105 So. 457, 1925 Miss. LEXIS 247 (Miss. 1925); Dorsey v. State, 141 Miss. 600, 106 So. 827, 1926 Miss. LEXIS 464 (Miss. 1926); Norris v. State, 143 Miss. 365, 108 So. 809, 1926 Miss. LEXIS 273 (Miss. 1926).

8. Transfer of venue.

After declaring a mistrial, the circuit judge erred in transferring venue to another county on its own motion over defendant's objection because the transfer of venue in a criminal case required defendant's sworn petition, but defendant made no such petition in the current case; thus, the case had to be remanded for trial in Yazoo County. Miles v. State, 204 So. 3d 745, 2016 Miss. LEXIS 485 (Miss. 2016).

OPINIONS OF THE ATTORNEY GENERAL

Where alleged perjured testimony was given in Oktibbeha County, proper jurisdiction over the matter would lie in the Circuit Court of that county. Burns, Nov. 5, 2004, A.G. Op. 04-0544.

RESEARCH REFERENCES

ALR.

Venue of civil libel action against newspaper or periodical. 15 A.L.R.3d 1249.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt. 67 A.L.R.3d 988.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 431-434 et seq., 461 et seq.

CJS.

22 C.J.S., Criminal Law §§ 218 et seq.

§ 99-11-5. Extent of criminal jurisdiction of State of Mississippi.

The criminal jurisdiction of the State of Mississippi is hereby extended as follows: Beginning at a point on the Mississippi River where the northern boundary line of the State of Mississippi intersects the thread, or middle of the stream of said river, and extending due west along a line parallel with, and in extension of the northern boundary line of the State of Mississippi to the west bank of said river, thence south along said bank and following the meandering thereof to the southern boundary line of the State of Arkansas, thence east to the thread, or middle of the stream of said river.

HISTORY: Codes, Hemingway's 1917, § 1150; 1930, § 1177; 1942, § 2420; Laws, 1910, ch. 141.

Cross References — How far counties on Mississippi River extend, see § 3-3-5.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2420] does not give Mississippi the power to enforce the laws of Arkansas. State v. Cunningham, 102 Miss. 237, 59 So. 76, 1912 Miss. LEXIS 49 (Miss. 1912).

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 344.

CJS.

22 C.J.S., Criminal Law §§ 141 et seq.

§ 99-11-7. Concurrent jurisdiction with Arkansas.

The State of Mississippi, and her sister state, Arkansas, have concurrent criminal jurisdiction over all the waters, islands, and territory lying opposite them and between the east and west banks of said river and the north boundary line of the State of Mississippi and the south boundary line of the State of Arkansas, at their intersection with the Mississippi River.

HISTORY: Codes, Hemingway's 1917, § 1151; 1930, § 1178; 1942, § 2421; Laws, 1910, ch. 141.

Cross References — How far counties on Mississippi River extend, see § 3-3-5.

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 454.

CJS.

22 C.J.S., Criminal Law §§ 141 et seq.

§ 99-11-9. Jurisdiction of paternity proceedings.

The circuit court of the county in which an illegitimate child is born shall have jurisdiction of any action brought under section 97-29-11, Mississippi

Code of 1972. No male person shall be convicted solely on the uncorroborated testimony of the female person giving birth to the child.

HISTORY: Codes, 1942, § 2018.6; Laws, 1964, ch. 341, §§ 1-4 (¶¶ 1-4).

Cross References — Uniform law on paternity, see §§ 93-9-1 et seq.

Person becoming natural parent of second illegitimate child guilty of misdemeanor, see § 97-29-11.

§ 99-11-11. Embezzlement.

When an embezzlement is committed it may be prosecuted in the county in which the money or property, or some part thereof, was received or converted by the accused, or in the county in which he was under obligation to pay over the funds or to deliver up the property.

HISTORY: Codes, 1892, § 1330; 1906, § 1402; Hemingway's 1917, § 1157; 1930, § 1182; 1942, § 2425.

Cross References — Criminal offense of embezzlement, see §§ 97-23-19 et seq.

JUDICIAL DECISIONS

1. In general.

Indictment charging felonious embezzlement and fraudulent appropriation of a rental car was deficient because it failed to allege the time when as well as the place where the defendant was to have returned the rented car to the rental business. The general charge of felonious embezzlement in the county in which the car was rented was not sufficient. Touchstone v. State, 159 Miss. 356, 132 So. 340, 1931 Miss. LEXIS 60 (Miss. 1931)

RESEARCH REFERENCES

ALR.

Where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 461 et seq.

26 Am. Jur. 2d, Embezzlement § 62.

§ 99-11-13. Kidnapping.

Every person who shall be accused of kidnapping may be indicted and tried either in the county where the offense may have been committed, or in any county into or through which any person so kidnapped or confined shall have been taken while under such confinement.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3(28); 1857, ch. 64, art. 187; 1871, § 2650; 1880, § 2898; 1892, § 1331; 1906, § 1403; Hemingway's 1917, § 1158; 1930, § 1183; 1942, § 2426.

Cross References — Criminal offense of kidnapping, see §§ 97-3-51 et seq.

JUDICIAL DECISIONS

1. In general.

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. Erwin v. State, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see Strahan v. State, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

RESEARCH REFERENCES

Am. Jur.

1 Am. Jur. 2d, Abduction and Kidnapping §§ 42, 43.

21 Am. Jur. 2d, Criminal Law §§ 461 et seq.

§ 99-11-15. Offenses commenced out of and consummated in state.

Where an offense is commenced out of this state and consummated in it, or where an offense is consummated in this state by any means or agency proceeding from a person out of this state, the person so commencing such offense or putting in operation such means or agency, although out of the state at the time such offense was actually consummated, shall be liable to indictment and punishment therefor in the county in which the offense was consummated.

HISTORY: Codes, 1857, ch. 64, art. 242; 1871, § 2752; 1880, § 2992; 1892, § 1332; 1906, § 1404; Hemingway's 1917, § 1159; 1930, § 1184; 1942, § 2427.

JUDICIAL DECISIONS

1. In general.

Venue was proper although state had offered no proof beyond reasonable doubt that sale or transfer of marijuana was contemplated in Alcorn County, because the gist of the crime was possession and prosecution was not required to prove specific place where defendant intended to sell or transfer contraband, and because §§ 99-11-15 and 99-11-17, while not directly applicable, clearly showed intent of legislature to allow Mississippi Court to prosecute criminal acts that occur in state but which did not begin or were not intended to end in state. Boches v. State, 506 So. 2d 254, 1987 Miss. LEXIS 2496 (Miss. 1987).

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 489, 490.

CJS.

22 C.J.S., Criminal Law §§ 443, 444.

§ 99-11-17. Offenses commenced in and consummated out of state.

Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded.

HISTORY: Codes, 1857, ch. 64, art. 243; 1871, § 2753; 1880, § 2993; 1892, § 1333; 1906, § 1405; Hemingway's 1917, § 1160; 1930, § 1185; 1942, § 2428.

JUDICIAL DECISIONS

1. In general.

Venue was proper although state had offered no proof beyond reasonable doubt that sale or transfer of marijuana was contemplated in Alcorn County, because the gist of the crime was possession and prosecution was not required to prove specific place where defendant intended to sell or transfer contraband, and because § 99-11-15 and this section, while not directly applicable, clearly showed intent of legislature to allow Mississippi Court to prosecute criminal acts that occur in state but which did not begin or were not intended to end in state. Boches v. State, 506 So. 2d 254, 1987 Miss. LEXIS 2496 (Miss. 1987).

Mississippi had jurisdiction pursuant to this section over action charging murder committed during commission of kidnapping, even though actual murder took place in Alabama, since crime of capital murder was commenced in Mississippi where defendant forcibly abducted victim and there was no break in chain of events leading from initial abduction to the actual murder. Pruett v. Thigpen, 665 F. Supp. 1254, 1986 U.S. Dist. LEXIS 27844 (S.D. Miss. 1986).

Where an offense under this section [Code 1942, § 2428] was commenced within this state and consummated out of this state, the defendant may be indicted and tried in the county in this state in which the offense was commenced. Richberger v. State, 90 Miss. 806, 44 So. 772, 1907 Miss. LEXIS 122 (Miss. 1907).

Cashier embezzling funds of state bank on deposit in bank of another state was indictable in this state. Richberger v. State, 90 Miss. 806, 44 So. 772, 1907 Miss. LEXIS 122 (Miss. 1907).

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 443, 444.

CJS.

22 C.J.S., Criminal Law §§ 224, 225.

§ 99-11-19. Offenses committed partly in one county and partly in another.

When an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county in which said offense was commenced, prosecuted, or consummated, where prosecution shall be first begun.

HISTORY: Codes, 1857, ch. 64, art. 244; 1871, § 2754; 1880, § 2994; 1892, § 1334; 1906, § 1406; Hemingway's 1917, § 1161; 1930, § 1186; 1942, § 2429.

Cross References — Application of this section to aircraft piracy cases, see § 97-25-55.

Occurrence in one jurisdiction causing death in another, see § 99-11-21.

Stolen property carried into state or carried from one county to another-where offender may be indicted and tried, see § 99-11-23.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction of court in which prosecution first begun.

1. In general.

Defendant's convictions for capital murder during the commission of a robbery were proper because the State satisfactorily established venue in Forrest County since sufficient evidence was presented to allow the jury to conclude beyond a reasonable doubt that the crimes had taken place, at least in part, in Forrest County. Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

Post-conviction relief was denied based on a venue challenge because at least part of the offense of statutory rape occurred in a county where defendant picked his victim up before having intercourse in another county, pursuant to Miss. Code Ann. § 99-11-19; moreover, defendant chose to enter a plea after being informed of a discrepancy regarding the issue of venue. Plummer v. State, 966 So. 2d 186, 2007 Miss. App. LEXIS 166 (Miss. Ct. App. 2007).

Although defendant claimed on appeal that he was prosecuted in the wrong county, he raised this issue for the first time on appeal, having never done so at trial; moreover, the crime was possession of a controlled substance and the evidence was that he did not obtain it at the end of the chase, but surely possessed it at the beginning, at the end, and at every point in between, so that its discovery at the point where the chase ended did not dilute the inference that he must have possessed the substance when the chase began in Oktibbeha County, Mississippi. Burnett v. State, 876 So. 2d 409, 2003 Miss. App. LEXIS 1184 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 853 (Miss. 2004).

In a prosecution for conspiracy to possess morphine and to commit grand larceny, possession of morphine, and aggravated assault, where testimony showed that defendants conspired to steal morphine in one county, and that their assault victim was found unconscious and injured in a second county, the evidence was sufficient to establish jurisdiction in the second county. Stubbs v. State, 845 So. 2d 656, 2003 Miss. LEXIS 115 (Miss. 2003).

The state properly elected a county as the venue in which to prosecute the defendant for murder in the course of kidnapping where it chose the county in which the victim was seen entering the defendant's truck, rather than the county in which the victim was killed. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S. 2000), in part, 2011 Miss. LEXIS 50 (Miss. Jan. 20, 2011).

A murder defendant was subject to jurisdiction in either the first or second judicial district of a county where the victim's abduction began in the second judicial district while the slaying occurred in the first judicial district. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

Where the defendant in a rape prosecution gave the victim a pill which produced dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. McKorkle v. State, 305 So. 2d 361, 1974 Miss. LEXIS 1485 (Miss. 1974).

Venue of a bribery prosecution is in the county in which an offer was made and the amount of the bribe tendered to an intermediary, though the offer was originally made to the intermediary in another county, and there communicated to the officer sought to be bribed. McLemore v.

State, 241 Miss. 664, 126 So. 2d 236, 1961 Miss. LEXIS 384 (Miss.), cert. denied, 368 U.S. 70, 82 S. Ct. 197, 7 L. Ed. 2d 133, 1961 U.S. LEXIS 137 (U.S. 1961).

Second judicial district of Hinds County was proper venue for prosecution for robbery when accused stopped truck, carrying bootleg liquor, in Claiborne County, forced driver of truck to turn over truck to one of defendants and occupy car with other defendant, which car followed truck, keeping within sight of it, until truck reached second judicial district of Hinds County where truck was driven beyond sight of its owner, unloaded, and later returned to him. Passons v. State, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273 (Miss. 1950), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

Venue of prosecution for uttering forged teacher's license held properly laid in county where license was mailed by accused, notwithstanding license was received in another county where contract was consummated by correspondence originating in county from which license was mailed. Bradford v. State, 171 Miss. 8, 156 So. 655, 1934 Miss. LEXIS 200 (Miss. 1934).

Accessory before fact to robbery is indictable and punishable as principal in county wherein robbery was consummated, though not in such county at time. Watson v. State, 166 Miss. 194, 146 So. 122, 1933 Miss. LEXIS 335 (Miss. 1933).

Where a crime is composed of several elements, and a material one exists in either of two counties, the courts of either county may take jurisdiction of the entire crime. Murray v. State, 98 Miss. 594, 54 So. 72, 1910 Miss. LEXIS 97 (Miss. 1910).

Venue of prosecution of the crime of false pretense in selling cotton raised in one county and sold in another under false pretenses was in county where sale occurred. Murray v. State, 98 Miss. 594, 54 So. 72, 1910 Miss. LEXIS 97 (Miss. 1910).

2. Jurisdiction of court in which prosecution first begun.

Jury could have reasonably found that the killing took place in the county where defendant's trial was held because the victim's body was found in a pond in that county, and defendant did not claim, and there was no evidence in the record, that the body had been relocated from a pond in another county to the pond in the instant county. Weaver v. State, 265 So. 3d 182, 2018 Miss. App. LEXIS 467 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 666, 2019 Miss. LEXIS 89 (Miss. 2019).

Dismissal of the inmate's motion for post-conviction relief without a hearing was appropriate under Miss. Code Ann. § 99-11-19 because jurisdiction was proper in Alcorn county even though the victim's ultimate death might not have occurred there; the commission of his crimes began in that county. Moss v. State, 940 So. 2d 949, 2006 Miss. App. LEXIS 536 (Miss. Ct. App. 2006).

Defendant's convictions for kidnapping and sexual battery were proper where jurisdiction in the circuit court was appropriate pursuant to Miss. Code Ann. § 99-11-19 because the circuit court was in the county from which the victim was kidnapped. Winding v. State, 908 So. 2d 163, 2005 Miss. App. LEXIS 332 (Miss. Ct. App. 2005).

In a prosecution for touching a child for lustful purposes in which it was not clear whether the crime was committed in one or the other of two judicial districts of a county, venue was properly set in the judicial district in which the automobile trip during which the crime was committed was commenced; the statute permitted a conviction in either judicial district of the county since, if the crime occurred, it was committed in one of those two districts. McGowan v. State, 742 So. 2d 1183, 1999 Miss. App. LEXIS 334 (Miss. Ct. App. 1999).

If one accused of murder is indicted in the county where the death occurred, he can afterward be indicted in another county where the fatal blow was struck, provided the first indictment had been dismissed. Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. Erwin v. State, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see Strahan v. State, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

Embezzlement of some pulp wood was partly committed in the county where prosecution was commenced, and venue there was proper, where the truck carrying the embezzled wood was loaded in the county and, while it was still there, the defendant gave an order to the driver as to where to deliver it. Bass v. State, 328 So. 2d 665, 1976 Miss. LEXIS 1812 (Miss. 1976).

Where the promise of marriage occurred in Forrest County and the act of intercourse occurred in Jones County, since both of these acts constituted essential elements of the offense of seduction, the jurisdiction thereof was governed by this section [Code 1942, § 2429], and it being proper to begin prosecution in either county, the circuit court of Forrest County had jurisdiction. Aldridge v. State, 232 Miss. 368, 99 So. 2d 456, 1958 Miss. LEXIS 283 (Miss. 1958).

Preliminary proceeding in robbery prosecution did not constitute beginning of prosecution in first district of Hinds County, within meaning of this section [Code 1942, § 2429] when county attorney presented information in county court, caption of which contained words: "County Court July Term A.D. 1948, First Judicial District, Hinds County," but which averred county attorney was informed and charged offense was committed in Hinds County, and order of county judge binding defendants over to await action of grand jury of second judicial district contained statement "court being advised in the premises," as it must be presumed court inquired into matter and was satisfied offense was committed in second district. Passons v. State, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273 (Miss. 1950), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

Where fatal blow occurred in Tennessee and deceased died in Mississippi, Mississippi court had jurisdiction of murder prosecution though assault prosecution had been previously instituted in Tennessee, since statute did not refer to interstate crimes. Caldwell v. State, 176 Miss. 80, 167 So. 779, 1936 Miss. LEXIS 114 (Miss. 1936).

Where crime committed partly in one county and partly in another of this state, the proper court of either county has jurisdiction thereof and the one in which prosecution is first begun has full and complete jurisdiction thereof. Atkinson v. State, 132 Miss. 377, 96 So. 310, 1923 Miss. LEXIS 55 (Miss. 1923), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

RESEARCH REFERENCES

ALR.

Construction and effect of statutes providing for venue of criminal case in either county, where crime is committed partly in one county and partly in another. 30 A.L.R.2d 1265.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Venue in rape cases where crime is committed partly in one place and partly in another. 100 A.L.R.3d 1174.

Venue in bribery cases where crime is committed partly in one county and partly in another. 11 A.L.R.4th 704.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 452 et seq.

§ 99-11-21. Occurrence in one jurisdiction causing death in another.

Where the mortal stroke or other cause of death occurs or is given or administered in one county, and the death occurs in another county, the offender may be indicted and tried in either county; and so, also, if the mortal stroke or cause of death occur or be given or administered in another state or country and the death happen in this state, the offender may be indicted and tried in the county in which the death happened.

HISTORY: Codes, 1857, ch. 64, art. 246; 1871, § 2756; 1880, § 2996; 1892, § 1335; 1906, § 1407; Hemingway's 1917, § 1162; 1930, § 1187; 1942, § 2430.

Cross References — Offenses committed partly in one county and partly in another, see § 99-11-19.

JUDICIAL DECISIONS

1. In general.

In defendant's manslaughter case, venue was properly established because the evidence showed that defendant shot the victim on or near the Lobutcha Creek Bridge, near the Leake County-Attala County line, defendant placed her body in the trunk of his car, drove northward, and left her body in Attala County. McBride v. State, 934 So. 2d 1033, 2006 Miss. App. LEXIS 539 (Miss. Ct. App. 2006).

There is no constitutional objection to Code 1942, § 2430 extending the jurisdiction of Mississippi to embrace a prosecution for murder based on injuries inflicted without the state where the death occurs within the state, and, further, the provisions of such section, coupled with the presumption that a person was killed in the state and county where the body was found, operates to minimize the possibility of one escaping punishment for murder because he is clever enough to conceal the place where the victim was killed or died. State v. Fabian, 263 So. 2d 773, 1972 Miss. LEXIS 1346 (Miss. 1972).

Where mortal blows were struck in one county and the deceased died in another county, the offender may be indicted in the second county. Butler v. State, 217 Miss. 750, 65 So. 2d 244, 1953 Miss. LEXIS 490 (Miss. 1953).

In murder prosecution brought in county of victim's death, exclusion of oral evidence raising question for first time that prior prosecution had been begun in county in which blows were inflicted, held not error, since mere oral testimony unsupported by record of former prosecution was not competent. Durr v. State, 175 Miss. 797, 168 So. 65, 1936 Miss. LEXIS 77 (Miss. 1936).

In murder prosecution, where defendant was prosecuted in county of victim's death and not county where blows were inflicted, question of jurisdiction arising from claim that prosecution had been first begun in county in which blows were inflicted held for court. Durr v. State, 175 Miss. 797, 168 So. 65, 1936 Miss. LEXIS 77 (Miss. 1936).

Statute providing for venue in county in which death happens where mortal stroke or cause of death occurs in another state or country and death happens in Mississippi held not unconstitutional. Caldwell v. State, 176 Miss. 80, 167 So. 779, 1936 Miss. LEXIS 114 (Miss. 1936).

In murder prosecution, proof that deceased died in county of prosecution held sufficient proof of venue. Jones v. State, 154 Miss. 640, 122 So. 760, 1929 Miss. LEXIS 170 (Miss. 1929).

This section [Code 1942, § 2430] is not violative of § 26, of the state constitution. Atkinson v. State, 132 Miss. 377, 96 So. 310, 1923 Miss. LEXIS 55 (Miss. 1923), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

Under this section [Code 1942, § 2430] where an indictment for murder charges that the crime was committed in the county in which the indictment is preferred, evidence is admissible that the death occurred in another county if the fatal blow was struck in the county in which the indictment is found. Coleman v. State, 83 Miss. 290, 35 So. 937, 1903 Miss. LEXIS 43 (Miss. 1903), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

RESEARCH REFERENCES

ALR.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Venue in rape cases where crime is committed partly in one place and partly in another. 100 A.L.R.3d 1174.

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 471.

40 Am. Jur. 2d, Homicide §§ 191 et seq.

CJS.

22 C.J.S., Criminal Law §§ 224, 225.

§ 99-11-23. Stolen property carried into state or carried from one county to another.

Where property is stolen in another state or country and brought into this state, or is stolen in one county in this state and carried into another, the offender may be indicted and tried in any county into or through which the property may have passed, or where the same may be found.

HISTORY: Codes, 1857, ch. 64, art. 245; 1871, § 2755; 1880, § 2995; 1892, § 1336; 1906, § 1408; Hemingway's 1917, § 1163; 1930, § 1188; 1942, § 2431.

Cross References — Offenses committed partly in one county and partly in another, see § 99-11-19.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Property stolen in another state.
3. Property stolen in another county.

1. Generally.

An indictment under this section [Code 1942, § 2431] properly avers that larceny took place in the county where accused is found possessing stolen property, if he is to be tried there. Coggins v. State, 234 Miss. 369, 106 So. 2d 388, 1958 Miss. LEXIS 505 (Miss. 1958).

Every moment's possession by accused after the property was stolen amounted to a new asportation. Coggins v. State, 234 Miss. 369, 106 So. 2d 388, 1958 Miss. LEXIS 505 (Miss. 1958).

2. Property stolen in another state.

Where property involved was stolen in Illinois, where defendant received it, venue to try defendant lay in Leflore County, since the crime of receiving stolen property was, under Code 1942, § 2431, committed in Leflore County when he brought the stolen property into that county. Brown v. State, 281 So. 2d 924, 1973 Miss. LEXIS 1501, 1973 Miss. LEXIS 1502 (Miss. 1973).

Fact that a car in which the defendant was riding was stopped by officers in Jackson County, Mississippi and money orders stolen from a post office in Louisiana were found therein gave jurisdiction to the circuit court of Jackson County under this section [Code 1942, § 2431]. Chavers v. State, 215 So. 2d 880, 1968 Miss. LEXIS 1385 (Miss. 1968).

Where accused had allegedly stolen property in another state and transported it into Mississippi, the indictment must aver the larceny took place in the county where accused is found possessing it, if he is to be tried there. Coggins v. State, 234 Miss. 369, 106 So. 2d 388, 1958 Miss. LEXIS 505 (Miss. 1958).

In a prosecution for larceny of property in another state and brought into Mississippi, conviction was supported on evidence that accused was in the apartment where the property was located at time the owner left for work, and when the owner returned neither accused nor property was there, possession of the property by accused two days later hundreds of miles away, together with accused's explanation of the admitted taking of the property, which explanation was neither reasonable nor credible. Coggins v. State, 234 Miss. 369, 106 So. 2d 388, 1958 Miss. LEXIS 505 (Miss. 1958).

One stealing hogs in another state, and after butchering them there bringing meat into this state, may be indicted here for larceny of meat. Rainwater v. State, 155 Miss. 684, 124 So. 801, 1929 Miss. LEXIS 335 (Miss. 1929).

Every moment's continuance of the original trespass amounts to a new caption and asportation, and hence if the goods be stolen in another state and brought here, the defendant can be convicted under an indictment averring the larceny to have been committed in the county in which the indictment was found, and evidence of the acts and declarations of the accused in the other state is admissible to show the character of his possession in this state. Watson v. State, 36 Miss. 593, 1859 Miss. LEXIS 72 (Miss. 1859).

3. Property stolen in another county.

Where stolen property is carried into another county without the person by whom it was stolen being in any way a party thereto, trial of such person for larceny in such county is a violation of the constitutional provisions requiring prosecution for crime to be conducted in the county where the offense was committed. Woods v. State, 190 Miss. 28, 198 So. 882, 1940 Miss. LEXIS 184 (Miss. 1940).

Where the evidence warranted a finding that the defendant stole a cow in Carroll County and there sold it to another who sent it in to LeFlore County where it was found by its owner, defendant having no further control over or connection with the cow after its sale and having nothing to do with its being carried into LeFlore County, his trial and conviction in the latter county was erroneous. Woods v. State, 190 Miss. 28, 198 So. 882, 1940 Miss. LEXIS 184 (Miss. 1940).

Although theft of property occurred in another county, court of county in which stolen property was discovered could exercise jurisdiction of prosecution. Patterson v. State, 171 Miss. 1, 156 So. 595, 1934 Miss. LEXIS 191 (Miss. 1934).

Conviction in county of theft is bar to prosecution in county to which stolen property was taken. State v. Hilton, 144 Miss. 690, 110 So. 434, 1926 Miss. LEXIS 404 (Miss. 1926).

Where property is stolen in one county and carried into another, an indictment in the latter must aver the larceny as if it originated there. Johnson v. State, 47 Miss. 671, 1873 Miss. LEXIS 20 (Miss. 1873); Slaydon v. State, 243 Miss. 644, 139 So. 2d 665, 1962 Miss. LEXIS 389 (Miss. 1962).

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 452 et seq.

CJS.

22 C.J.S., Criminal Law § 223.

§ 99-11-25. Aiding, encouraging or causing commission of crime within state by person while out of state.

A person who being out of this state causes, aids, advises or encourages any person to commit a crime or public offense within this state and is afterwards found within this state shall be punished in the same manner as if he had been within this state when he caused, aided, advised or encouraged the commission of such crime or public offense.

HISTORY: Codes, 1942, § 2431.5; Laws, 1964, ch. 335, eff from and after passage (approved June 11, 1964).

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 443, 444.

§ 99-11-27. Former acquittal or conviction in another jurisdiction.

Every person charged with an offense committed in another state, territory, or country may plead a former conviction or acquittal for the same offense in such other state, territory, or country; and, if such plea be established, it shall be a bar to any further proceedings for the same offense here.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(6); 1857, ch. 64, art. 4; 1871, § 2881; 1880, § 2997; 1892, § 1337; 1906, § 1409; Hemingway's 1917, § 1164; 1930, § 1189; 1942, § 2432.

Cross References — Constitutional provision on double jeopardy, see Miss. Const. Art. 3, § 22.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.

1. In general.

The statute did not apply when the prior conviction was for a federal offense. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

2. Applicability.

This section does not apply to federal convictions. Campbell v. State, 743 So. 2d 1050, 1999 Miss. App. LEXIS 317 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR.

Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense. 75 A.L.R.2d 683.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts-modern view. 6 A.L.R.4th 802.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions. 40 A.L.R.4th 514.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts – Modern view. 97 A.L.R.5th 201.

Acquittal or conviction in state court as bar to federal prosecution based on same act or transaction. 18 A.L.R. Fed. 393.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 321 et seq.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

Lawyers' Edition.

Limitations under double jeopardy

clause of Fifth Amendment upon state criminal prosecutions. 25 L. Ed. 2d 968.

§ 99-11-29. Acquittal for variance between indictment and proof or on exception to form.

Where a defendant is acquitted of a criminal charge upon trial on the ground of a variance between the indictment and proof, or upon exception to the form or substance of the indictment or record, he may be tried and convicted upon a subsequent indictment for the offense actually committed, notwithstanding such acquittal; and it shall be the duty of the court to order the accused into the custody of the proper officer.

In all cases of acquittal on the ground of variance between the indictment and proof, the jury, in rendering its verdict, shall so certify.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 1 (5), (6); 1857, ch. 64, arts. 5, 6; 1871, §§ 2882, 2883; 1880, §§ 2998, 2999; 1892, §§ 1338, 1339; 1906, §§ 1410, 1411; Hemingway's 1917, §§ 1165, 1166; 1930, §§ 1190, 1191; 1942, §§ 2433, 2434.

Cross References — Constitutional provisions on double jeopardy, see Miss. Const. Art. 3, § 22 and U.S. Const. Amend. V.

JUDICIAL DECISIONS

1. In general.

Defendant's right against being subjected to double jeopardy was not violated when the State was given a second opportunity to prove that he was a habitual offender because his first indictment was not set aside because the indictment erroneously alleged that he was a habitual offender as his first capital-murder indictment was set aside because that indictment failed to allege the crime constituting the burglary, which was the predicate crime for the capital-murder charge; and defendant was at the time of both the first and second indictments a habitual offender. Clark v. State, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

Defendant's right against being subjected to double jeopardy was not violated when he was tried, convicted, and sentenced a second time for the victim's murder because the Double Jeopardy Clause did not preclude defendant's second trial after his first prosecution was dismissed due to insufficiency of the indictment. Clark v. State, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

In prosecution for attempted burglary of business dwelling, double jeopardy clause of United States and Mississippi Constitutions was not violated by retrial of defendant following order quashing indictment due to its insufficiency and failure to charge crime, since defendant was neither acquitted nor convicted, having successfully persuaded trial court not to submit issue of guilt or innocence to jury empaneled to try him. City of Jackson v. Keane, 502 So. 2d 1185, 1987 Miss. LEXIS 2676 (Miss. 1987).

Where the order of the court was a nolle prosequi the defendant may be reindicted, or he may be tried upon an indictment charging him with another offense actually committed but for which he was not tried. State v. Thornhill, 251 Miss. 718, 171 So. 2d 308, 1965 Miss. LEXIS 896 (Miss. 1965).

Where a conviction on a charge of grand larceny was reversed by the supreme court, that court, instead of rendering a final judgment, remanded the case to enable the trial judge, if he should think proper, to act upon the statutory authority given him where a defendant is acquitted on the ground of variance between the indictment and proof. Alford v. State, 193 Miss. 153, 8 So. 2d 508, 1942 Miss. LEXIS 112 (Miss. 1942).

Where the proof in a grand larceny prosecution showed that the stolen cattle were taken in Tallahatchie County and were taken from the possession of the defendants in Coahoma County, without having passed through Grenada County, in which the indictment alleged the offense to have been committed, the trial court should have sustained defendant's motion that venue was not proved in Grenada County; and the supreme court would render the judgment which the court below should have rendered by discharging the defendants from the present indictment, but holding them under their appearance bond to await the action of the next grand jury of the appropriate county. Whitten v. State, 189 Miss. 809, 199 So. 74, 1940 Miss. LEXIS 167 (Miss. 1940).

Where affidavit charged petit larceny, but proof showed offense under statute respecting larceny in severing fixtures, peremptory instruction should have been granted and accused held under bond for further proceedings. O'Neal v. State, 166 Miss. 538, 146 So. 634, 1933 Miss. LEXIS 353 (Miss. 1933).

An acquittal in a trial under an indictment charging an offense against a daughter when the proof disclosed that it was a stepdaughter, does not bar a subsequent prosecution for the offense against the stepdaughter. Sims v. State, 66 Miss. 33, 5 So. 525, 1888 Miss. LEXIS 54 (Miss. 1888).

RESEARCH REFERENCES

ALR.

What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea. 63 A.L.R.2d 782.

Former jeopardy: Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter to, or making prejudicial remarks in presence of jury. 77 A.L.R.3d 1143.

Am. Jur.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

§ 99-11-31. Acquittal on the merits.

When a defendant is acquitted on the merits of his case, and not on any ground stated in Section 99-11-29 such acquittal shall be a bar to any subsequent accusation for the same offense, notwithstanding any defect in the record, or in the form or substance of the indictment upon which such acquittal was had.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 1(5); 1857, ch. 64, art. 6; 1871, § 2883; 1880, § 2999; 1892, § 1339; 1906, § 1411; Hemingway's 1917, § 1166; 1930, § 1191; 1942, § 2434.

Cross References — Constitutional provisions on double jeopardy, see Miss Const Art. 3, § 22, and U.S. Const., Amend. V.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Former jeopardy.
3. Acquittal as precluding trial of different charge predicated on same act, or act done at same time.
4. Violation of statute and ordinance by same act.
5. Miscellaneous.

1. In general.

Where the defendant has been acquitted upon the merits of his case by reason of a directed verdict, such acquittal is a bar to any future accusation for the same offense, and an appeal does not subject the defendant to further prosecution. State v. Thornhill, 251 Miss. 718, 171 So. 2d 308, 1965 Miss. LEXIS 896 (Miss. 1965).

Defense of former acquittal or conviction must be pleaded by the defendant before evidence thereof will be admitted. Tanner v. State, 196 Miss. 822, 18 So. 2d 300, 1944 Miss. LEXIS 260 (Miss. 1944).

A collusive acquittal will not bar a subsequent prosecution. Price v. State, 104 Miss. 288, 61 So. 314, 1913 Miss. LEXIS 31 (Miss. 1913).

An indictment dismissed by a nolle prosequi is not a bar to another indictment for the same crime. State v. Kennedy, 96 Miss. 624, 50 So. 978, 1910 Miss. LEXIS 150 (Miss. 1910).

A conviction or acquittal on any charge without an affidavit or indictment charging the offense is no bar to subsequent prosecution for the same offense. Woodson v. State, 94 Miss. 370, 48 So. 295, 1908 Miss. LEXIS 43 (Miss. 1908).

The offenses must be identical. Smith v. State, 67 Miss. 116, 7 So. 208, 1889 Miss. LEXIS 35 (Miss. 1889).

An acquittal or conviction in a court without jurisdiction is not a bar to a subsequent prosecution. Montross v. State, 61 Miss. 429, 1883 Miss. LEXIS 154 (Miss. 1883).

A conviction or acquittal without an affidavit or charge is no bar to subsequent prosecution. Bigham v. State, 59 Miss. 529, 1882 Miss. LEXIS 151 (Miss. 1882); Wilcox v. Williamson, 61 Miss. 310, 1883 Miss. LEXIS 127 (Miss. 1883).

A conviction or acquittal on an invalid indictment is no bar to a second prosecution. Hurt v. State, 25 Miss. 378, 1853 Miss. LEXIS 3 (Miss. 1853); Kohlheimer v. State, 39 Miss. 548, 1860 Miss. LEXIS 87 (Miss. 1860).

2. Former jeopardy.

One acquitted of violating Code 1942, § 1198, the general statute penalizing adultery and fornication, is not twice in jeopardy by being charged under Code 1942, § 2000. Ratcliff v. State, 234 Miss. 724, 107 So. 2d 728, 1958 Miss. LEXIS 542 (Miss. 1958).

An instance where a plea of former jeopardy is held good on a charge of unlawfully selling liquors. King v. State, 99 Miss. 23, 54 So. 657, 1910 Miss. LEXIS 6 (Miss. 1910); Williams v. State, 102 Miss. 274, 59 So. 87, 1912 Miss. LEXIS 52 (Miss. 1912).

An instance where a plea of former jeopardy is held good on a charge of unlawfully selling liquors. King v. State, 99 Miss. 23, 54 So. 657, 1910 Miss. LEXIS 6 (Miss. 1910); Williams v. State, 102 Miss. 274, 59 So. 87, 1912 Miss. LEXIS 52 (Miss. 1912).

Under the section [Code 1942, § 2434] a prisoner is not entitled to a discharge because after the introduction of evidence one of the jurors was reminded that he had been upon the grand jury which found the indictment, and, making the fact known, was discharged by the court. Roberts v. State, 72 Miss. 728, 18 So. 481, 1895 Miss. LEXIS 64 (Miss. 1895).

3. Acquittal as precluding trial of different charge predicated on same act, or act done at same time.

Failure of defendant in robbery prosecution to plead former acquittal barred introduction of evidence that he formerly had been acquitted of assault and battery with intent to kill and murder, and that the indictment in the present case was based on the same evidence as that in the former case. Tanner v. State, 196 Miss. 822, 18 So. 2d 300, 1944 Miss. LEXIS 260 (Miss. 1944).

Where proof was sufficient to support conviction for robbery, conviction of grand larceny would bar future prosecution for robbery based on same facts. Dixon v. State, 169 Miss. 876, 154 So. 290, 1934 Miss. LEXIS 85 (Miss. 1934).

Failure to support one's family is a different offense from that of abandonment of wife and child. McRae v. State, 104 Miss. 861, 61 So. 977, 1913 Miss. LEXIS 90 (Miss. 1913).

A prosecution for converting funds in the hands of an officer is barred by a former conviction of the officer under a charge of failure to account for said money. McInnis v. State, 97 Miss. 280, 52 So. 634, 1910 Miss. LEXIS 258 (Miss. 1910).

"Balance of Account" in an indictment for embezzlement is a bar to a prosecution for embezzling a particular item of the account, where the accused had been acquitted under the first prosecution. State v. Caston, 96 Miss. 183, 50 So. 569, 1909 Miss. LEXIS 38 (Miss. 1909).

An acquittal on a charge of selling liquor does not bar a prosecution for conniving at a sale founded on the same facts. Carroll v. State, 80 Miss. 349, 31 So. 742, 1902 Miss. LEXIS 245 (Miss. 1902).

An acquittal under an indictment for assault and battery with intent to kill and murder does not bar a prosecution predicated on the same acts under a charge of aiming and discharging firearms at another. Richardson v. State, 79 Miss. 289, 30 So. 650, 1901 Miss. LEXIS 50 (Miss. 1901).

A conviction on a charge of drunkenness does not bar a prosecution for disturbing public worship at the same time and place, where the disturbance was by other means than drunkenness. Smith v. State, 67 Miss. 116, 7 So. 208, 1889 Miss. LEXIS 35 (Miss. 1889); Ball v. State, 67 Miss. 358, 7 So. 353, 1889 Miss. LEXIS 91 (Miss. 1889).

A conviction or acquittal upon an indictment for assault and battery with intent to kill bars a subsequent prosecution for assault and battery and simple assault. Jones v. State, 66 Miss. 380, 6 So. 231, 1889 Miss. LEXIS 109 (Miss. 1889).

An acquittal under an indictment for murder which does not charge an assault and battery is not good in bar of a subsequent prosecution for the latter offense. Moore v. State, 59 Miss. 25, 1881 Miss. LEXIS 67 (Miss. 1881).

If a person engaged in a difficulty with two opponents unlawfully strikes each of them, he is subject to conviction for each assault, and a conviction for one will not bar a conviction for the other. Teat v. State, 53 Miss. 439, 1876 Miss. LEXIS 94 (Miss. 1876); Jones v. State, 66 Miss. 380, 6 So. 231, 1889 Miss. LEXIS 109 (Miss. 1889).

Reversal of a conviction for manslaughter and acquittal of murder on indictment for murder does not prevent another trial on the same indictment for manslaughter. Rolls v. State, 52 Miss. 391, 1876 Miss. LEXIS 227 (Miss. 1876); Powers v. State, 83 Miss. 691, 36 So. 6, 1903 Miss. LEXIS 90 (Miss. 1903), overruled, Jones v. State, 144 Miss. 52, 109 So. 265, 1926 Miss. LEXIS 341 (Miss. 1926).

4. Violation of statute and ordinance by same act.

The legislature can constitutionally confer on municipalities the power by ordinance to punish as an offense against the municipality an act which constitutes a crime against the state. Town of Ocean Springs v. Green, 77 Miss. 472, 27 So. 743, 1899 Miss. LEXIS 98 (Miss. 1899).

A conviction of an offense under a municipal ordinance is not a bar to a prosecution by the state for same act. Johnson v. State, 59 Miss. 543, 1882 Miss. LEXIS 155 (Miss. 1882).

5. Miscellaneous.

State failed to prove the elements of embezzlement in violation of Miss. Code Ann. § 97-23-19 beyond a reasonable doubt and thus the trial court erred in denying defendant's motion for a directed verdict; in order to prove embezzlement, the State had to provide evidence of the following: (1) a company owned the car in question, (2) the car was lawfully entrusted to defendant, and (3) defendant wrongfully converted the vehicle to his own use, and while the State established car ownership by the company given the vehicle identification number, the State did not prove that defendant was entrusted with the vehicle, given that (1) defendant did not have permission to take company vehicle off the lot just by being an employee of the company, (2) the car belonged to a different location where defendant was never employed, and (3) defendant did not possess a valid driver's license, which prohibited him from lawfully driving company vehicles as part of his job. At best, the evidence might have shown the actual theft of property, but it did not prove embezzlement, and the court reversed and rendered. Luckett v. State, 989 So. 2d 995, 2008 Miss. App. LEXIS 527 (Miss. Ct. App. 2008).

A defendant's conviction and sentence on a charge of rape did not subject him to double jeopardy even though he had also been convicted and sentenced on a burglary charge which arose out of the same facts and circumstances as the rape charge. Norman v. State, 543 So. 2d 1163, 1989 Miss. LEXIS 264 (Miss. 1989).

A conviction by a court held on Sunday will bar a subsequent prosecution. Cherry v. State, 103 Miss. 225, 60 So. 138, 1912 Miss. LEXIS 159 (Miss. 1912).

A conviction of the accused before a justice of the peace will bar an action in the circuit court under indictment for the same offense. Smith v. State, 101 Miss. 853, 58 So. 539, 1912 Miss. LEXIS 18 (Miss. 1912).

A failure of a court to pronounce a proper sentence will not prevent a bar to a second prosecution for the same offense. Smithey v. State, 93 Miss. 257, 46 So. 410, 1908 Miss. LEXIS 82 (Miss. 1908).

An affidavit charging under a city ordinance against leaking water pipes where there has been an acquittal in another prosecution for the same offense is barred. Crumpler v. Vicksburg, 89 Miss. 214, 42 So. 673, 1906 Miss. LEXIS 76 (Miss. 1906).

It is not violative of the section [Code 1942, § 2434] for the court, upon a conviction of an offender, to suspend the sentence except as to costs, and at a future term to impose a fine, etc. Gibson v. State, 68 Miss. 241, 8 So. 329, 1890 Miss. LEXIS 23 (Miss. 1890).

On a charge of gaming a conviction for the particular offense charged in an indictment does not confer immunity as to similar offenses committed prior to the time laid in the indictment, unless evidence thereof was adduced in the trial. Pope v. State, 63 Miss. 53, 1885 Miss. LEXIS 12 (Miss. 1885).

RESEARCH REFERENCES

ALR.

Former jeopardy as ground for habeas corpus. 8 A.L.R.2d 285.

Conviction of lesser offense as bar to prosecution for greater on new trial. 61 A.L.R.2d 1141.

Conviction from which appeal is pending as bar to another prosecution for same offense. 61 A.L.R.2d 1224.

What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea. 63 A.L.R.2d 782.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide. 11 A.L.R.3d 834.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 A.L.R.4th 934.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 275 et seq.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

§ 99-11-33. Acquittal or conviction by justice of the peace for misdemeanor not to bar prosecution for felony.

The acquittal or conviction of a person by a justice of the peace, or a county court on a charge of being guilty of a misdemeanor, shall not be a bar to a prosecution for a felony in the same matter; but thereafter, on indictment for the felony, if the accused be acquitted thereof, he shall not be convicted of the constituent misdemeanor; and, if convicted of the felony, the court may moderate the sentence so as not to punish for the constituent misdemeanor.

HISTORY: Codes, 1880, § 3000; 1892, § 1340; 1906, § 1412; Hemingway's 1917, § 1167; 1930, § 1192; 1942, § 2435; Laws, 1928, ch. 43.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Constitutional provisions on double jeopardy, see Miss. Const. Art. 3, § 22 and U.S. Const. Amend. V.

Justices of peace in misdemeanor cases upon discovering crime to be felony being required to transfer case to circuit court, see § 99-33-13.

JUDICIAL DECISIONS

1. In general.

The statutory scheme embodied in Code 1942, §§ 1202, 1803, 1832, 1839, 2435, 2535, and 3915 clearly embraces sufficient safeguards for fair jury trial in justice of the peace courts, composed of a fair cross-section of the citizens of the community, completely without regard to race or sex, and the justice must conform his judgment to the verdict of such a jury. Shaffer v. Bridges, 295 F. Supp. 869, 1969 U.S. Dist. LEXIS 8348 (S.D. Miss. 1969), dismissed, Hall v. Baum, 397 U.S. 93, 90 S. Ct. 818, 25 L. Ed. 2d 79, 1970 U.S. LEXIS 2741 (U.S. 1970), dismissed, 397 U.S. 94, 90 S. Ct. 818, 25 L. Ed. 2d 80, 1970 U.S. LEXIS 2742 (U.S. 1970).

Where a justice of the peace impaneled a jury to try a case and afterwards discharged it and continued the case without a charge on merits held not to constitute former jeopardy. Chandler v. State, 140 Miss. 524, 106 So. 265, 1925 Miss. LEXIS 287 (Miss. 1925).

The statute is not violative of Const. 1890, § 22, declaring that no one shall be twice placed in jeopardy for the same offense. Huffman v. State, 84 Miss. 479, 36 So. 395, 1904 Miss. LEXIS 49 (Miss. 1904).

An acquittal of assault and battery before a justice bars a subsequent conviction of assault and battery on an indictment for assault with intent to murder. Rucker v. State, 24 So. 311 (Miss. 1898).

RESEARCH REFERENCES

ALR.

Conviction of lesser offense as bar to prosecution for greater on new trial. 61 A.L.R.2d 1141.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 305 et seq.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

§ 99-11-35. No acquittal for defects of form.

A person shall not be acquitted or discharged in a criminal case, before verdict, for any irregularity or informality in the pleadings or proceedings; nor shall any verdict or judgment be arrested, reversed or annulled after the same is rendered, for any defect or omission in any jury, either grand or petit, or for any other defect of form which might have been taken advantage of before verdict, and which shall not have been so taken advantage of.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(65); 1857, ch. 64, art. 7; 1871, § 2884; 1880, § 3001; 1892, § 1341; 1906, § 1413; Hemingway's 1917, § 1168; 1930, § 1193; 1942, § 2436.

Cross References — Formal or technical words not necessary in an indictment, see § 99-7-3.

Acquittal for variance between indictment and proof or on exception to form, see § 99-11-29.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Failure to swear jury.
3. Defects in, or pertaining to, indictment or affidavit.

1. In general.

The statute is constitutional. Ex parte Phillips, 57 Miss. 357, 1879 Miss. LEXIS 89 (Miss. 1879).

2. Failure to swear jury.

Defendants could not complain for first time on appeal that grand jury and petit jury were not sworn. Brown v. State, 173 Miss. 542, 158 So. 339, 161 So. 465, 1935 Miss. LEXIS 190 (Miss. 1935).

Murder conviction would not be reversed on ground that grand jury and petit jury were not sworn, where fact did not affirmatively appear. Brown v. State, 173 Miss. 542, 158 So. 339, 161 So. 465, 1935 Miss. LEXIS 190 (Miss. 1935).

The failure of the court to specially swear a jury in a capital case where there is no objection raised before verdict cannot be taken advantage of for the first time on motion for a new trial. Hill v. State, 112 Miss. 375, 73 So. 66, 1916 Miss. LEXIS 121 (Miss. 1916).

The defect in the failure to seasonably swear all of the grand jurors, who were afterwards sworn, cannot be taken advantage of for the first time after verdict. Boroum v. State, 105 Miss. 887, 63 So. 297, 1913 Miss. LEXIS 272 (Miss. 1913).

A plea of "not guilty" before filing a motion to quash an indictment does not waive the right to object that the grand jury was not sworn, and to permit such a motion is discretionary with the court. Hardy v. State, 96 Miss. 844, 51 So. 460, 1910 Miss. LEXIS 176 (Miss. 1910).

Where the minutes of the court do not show that the grand jury was sworn, an indictment by such grand jury will be held void. Hardy v. State, 96 Miss. 844, 51 So. 460, 1910 Miss. LEXIS 176 (Miss. 1910).

Under this section [Code 1942, § 2436] an objection that the grand jury was not sworn will be presumed not well taken in the absence of a record to the contrary, when the point is raised for the first time on a motion to arrest judgment. Hays v. State, 96 Miss. 153, 50 So. 557, 1909 Miss. LEXIS 30 (Miss. 1909).

3. Defects in, or pertaining to, indictment or affidavit.

Where the appellant failed to plead that his surname was not shown in the indictment before pleading not guilty, he waived his right to claim that he was not the person named in the indictment, and the trial court was not required to amend the indictment on its own motion. Anselmo v. State, 312 So. 2d 712, 1975 Miss. LEXIS 1656 (Miss. 1975).

The right to receive a copy of the indictment pursuant to Code 1942 § 2441, may be waived by the accused where no objection is raised in the trial court. Yarbrough v. Dowell Div. of Dow Chemical Co., 285 So. 2d 170, 1973 Miss. LEXIS 1281 (Miss. 1973).

An indictment for burglary which stated in the body thereof that the grand jurors were taken from the County of Sunflower where in fact they were taken from the County of Humphreys was defective as to form but did not prejudice the defendant nor violate any of his constitutional rights and the defendant could not raise an objection for the first time after his conviction. Temple v. State, 221 Miss. 569, 73 So. 2d 174, 1954 Miss. LEXIS 564 (Miss. 1954).

Objection that foreman of grand jury did not indorse name on indictment could not be raised for first time on appeal. Pruitt v. State, 163 Miss. 47, 139 So. 861, 1932 Miss. LEXIS 16 (Miss. 1932).

Complaint that indictment was not sufficiently identified because of absence of clerk's filing indorsement could not be raised for first time on appeal. Wooten v. State, 155 Miss. 726, 125 So. 103, 1929 Miss. LEXIS 349 (Miss. 1929).

Conviction on plea of guilty entered on amendable affidavit is good and cannot be set aside on certiorari for defective affidavit. Bogle v. State, 155 Miss. 612, 125 So. 99, 1929 Miss. LEXIS 347 (Miss. 1929).

Defect in affidavit charging possession of liquor on information and belief cannot be raised for first time on appeal. Stewart v. State, 151 Miss. 649, 118 So. 626, 1928 Miss. LEXIS 369 (Miss. 1928).

Claimed defect in indictment as not properly signed can be reached only on motion to quash and is not available for the first time on appeal. Wilcher v. State, 152 Miss. 13, 118 So. 356, 1928 Miss. LEXIS 207 (Miss. 1928).

An indictment of a woman for infanticide describing the persons killed as "two certain human beings the same being her (the defendant's) children," is good after verdict because of the provisions of Code 1892, §§ 1341, 1354, 1435 [Code 1942, §§ 2436, 2449, 2532]. Wilkinson v. State, 77 Miss. 705, 27 So. 639, 1900 Miss. LEXIS 24 (Miss. 1900).

The judgment should be arrested in a felony case, notwithstanding Code 1892, §§ 1341, 1354 (Code 1942, §§ 2436, 2449), unless the indictment clearly states the nature and cause of the accusation. Taylor v. State, 74 Miss. 544, 21 So. 129, 1896 Miss. LEXIS 150 (Miss. 1896).

If it is not demurred to, under this section [Code 1892, § 1341 (Code 1942, § 2436)] an indictment under Code 1892, § 1298 [Code 1942, § 2374] is sufficient after verdict although it does not allege that the promise was made to the woman, where it does charge that the defendant had carnal knowledge of a woman by virtue of a false or feigned promise of marriage. Coates v. Worthy, 72 Miss. 575, 17 So. 606, 1895 Miss. LEXIS 24 (Miss. 1895).

The statute applies only to such defects in the indictment as can be waived, constitutional rights cannot be waived. Newcomb v. State, 37 Miss. 383, 1859 Miss. LEXIS 27 (Miss. 1859).

RESEARCH REFERENCES

ALR.

Separation of jury in criminal case after submission of cause-modern cases. 72 A.L.R.3d 248.

Am. Jur.

41 Am. Jur. Trials 383, Habeas Corpus: Pretrial Motions (double jeopardy).

§ 99-11-37. Cognizance and jurisdiction of crimes committed in particular district in Harrison County or Hinds County.

(1) In Harrison County, a county having two (2) judicial districts, all crimes and misdemeanors shall be cognizable only in the proper court of the

district in which the offense may be committed, and such court shall have jurisdiction of the same.

(2) In Hinds County, a county having two (2) judicial districts, all crimes and misdemeanors committed in Hinds County shall be cognizable in the court of either judicial district of the county, and such court shall have jurisdiction of the same. Any and all proceedings may be conducted in either judicial district.

HISTORY: Codes, 1942, § 2910-16; Laws, 1962, ch. 257, § 16; Laws, 1993, ch. 352, § 2, eff from and after passage (approved March 16, 1993).

§ 99-11-39. Transmittal of records on change of venue or transfer or removal of trial in Harrison County or Hinds County.

(1) In Harrison County, a county having two (2) judicial districts, in all criminal cases where the venue thereof shall be changed, or the trial transferred or removed from one district to the other, the original papers, together with certified copies of all motions, orders and decrees made and entered in such suits, proceedings, matters and cases, shall be transmitted, transferred and filed by the proper clerk to and in his office at the proper place to which such change of venue or transfer shall be made.

(2) In Hinds County, a county having two (2) judicial districts, in all criminal cases where the venue thereof may be changed, or the trial transferred or removed from one district to the other, the original papers, together with certified copies of all motions, orders and decrees made and entered in such suits, proceedings, matters and cases, may be transmitted, transferred and filed by the proper clerk to and in his office at the proper place to which such change of venue or transfer may be made.

HISTORY: Codes, 1942, § 2910-18; Laws, 1962, ch. 257, § 18; Laws, 1993, ch. 352, § 3, eff from and after passage (approved March 16, 1993).

CHAPTER 13.

INSANITY PROCEEDINGS

Sec.
99-13-1. Definition of "person with an intellectual disability.".
99-13-3. Disposition of offender who is insane or a person with an intellectual disability brought before conservator of the peace.
99-13-5. Disposition of an accused who grand jury has found to be insane or a person with an intellectual disability.
99-13-7. Acquittal for insanity; presumption of continuing mental illness and dangerousness of person acquitted on ground of insanity; challenge to presumption; hearing; right to counsel.
99-13-9. Acquittal on the ground of having an intellectual disability.
99-13-11. Mental examination of person charged with felony; cost.

§ 99-13-1. Definition of "person with an intellectual disability."

The term "person with an intellectual disability," within the meaning of this chapter, shall have the same meaning as the term "person with an intellectual disability" in Section 41-21-61.

HISTORY: Codes, Hemingway's 1921 Supp. § 5728b; 1930, § 7269; 1942; § 6764; Laws, 1920, ch. 210; Laws, 1984, ch. 472, § 1; Laws, 2008, ch. 442, § 34; Laws, 2010, ch. 476, § 81, eff from and after passage (approved Apr. 1, 2010.).

Cross References — Definition of insanity for purposes of suspending death sentence execution, see § 99-19-57.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

JUDICIAL DECISIONS

1. In general.

In the prosecution of a 14-year-old mentally retarded defendant for armed robbery, the trial court did not err in refusing to give an instruction that, if the jury found that the defendant was not responsible for his acts because of feeble-mindedness or mental retardation, they should acquit him where there was no evidence that, at the time the defendant committed the criminal act, he did not realize and appreciate the nature and quality thereof and could not distinguish right from wrong. May v. State, 398 So. 2d 1331, 1981 Miss. LEXIS 2021 (Miss. 1981).

RESEARCH REFERENCES

Am. Jur.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

40 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

Law Reviews.

Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

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Perlin, Michael L., Cucolo, Heather Ellis, Mental Disability Law: Civil and Criminal, Third Edition (LexisNexis).

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Schoenberg, Ronald L., Criminal Law Deskbook (Matthew Bender).

Shapiro, Jay, Criminal Practice Handbook, Fifth Edition (Michie).

Criminal Constitutional Law (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (LexisNexis Law Enforcement).

§ 99-13-3. Disposition of offender who is insane or a person with an intellectual disability brought before conservator of the peace.

When any prisoner or any person charged with a crime or delinquency is brought before any conservator of the peace, and in the course of the investigation it appears that the person was insane when the offense was committed and still is insane, or was a person with an intellectual disability to such an extent as not to be responsible for his or her act or omission at the time when the act or omission charged was made, he shall not be discharged, but the conservator of the peace shall remand the prisoner to custody and immediately report the case to the chancellor or clerk of the chancery court, whose duty it shall be to proceed with the case according to the law provided for persons with mental illness or persons with an intellectual disability.

HISTORY: Codes, 1880, § 3139; 1892, § 1466; 1906, § 1538; Hemingway's 1917, § 1300; Hemingway's 1921 Supp, § 5728x; 1930, §§ 1325, 7287; 1942, §§ 2573, 6777; Laws, 1920, ch. 210; Laws, 2008, ch. 442, § 35; Laws, 2010, ch. 476, § 82, eff from and after passage (approved Apr. 1, 2010).

Cross References — Conservators of the peace generally, see §§ 99-15-1 through 99-15-11.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2.-5. [Reserved for future use.]

II. UNDER FORMER LAW.

6. In general.

I. UNDER CURRENT LAW.

1. In general.

The test of a defendant's sanity is whether he had sufficient mental capacity at time of commission of homicide to distinguish right and wrong, regardless of whether defendant was partially insane. Hamburg v. State, 203 Miss. 565, 35 So.

2d 324, 1948 Miss. LEXIS 307 (Miss. 1948).

While a defendant charged with crime has right to orally suggest, as by motion, to the court that he may be insane, such motion or suggestion must be accompanied by affidavits or the offer of witnesses to prove insanity or inability to plead or conduct rational defense. Skinner v. State, 198 Miss. 505, 23 So. 2d 501, 1945 Miss. LEXIS 223 (Miss. 1945), overruled, Speagle v. State, 390 So. 2d 990, 1980 Miss. LEXIS 2163 (Miss. 1980).

While instruction, in murder prosecution wherein defendant invoked defense of mental responsibility, that peculiarities of conduct on occasions do not amount to proof of insanity, should not be given, the granting of such instruction was not reversible error where there was no evidence that the accused, when he committed the act, did not have the ability to realize and appreciate the nature and quality thereof, and to distinguish right from wrong, and where the court gave a further instruction that the jury should take into consideration the responsibility of the defendant for the crime charged against him in determining the degree of punishment to be inflicted. Wood v. State, 197 Miss. 657, 20 So. 2d 661, 1945 Miss. LEXIS 303 (Miss.), cert. denied, 325 U.S. 833, 65 S. Ct. 1087, 89 L. Ed. 1961, 1945 U.S. LEXIS 2121 (U.S. 1945).

Under this section [Code 1942, § 2573] and the two next following [Code 1942, §§ 2574, 2575], the defendant acquitted of murder because of insanity and put in the lunatic asylum cannot be discharged because of lucid intervals. Caffey v. State, 78 Miss. 645, 29 So. 396, 1900 Miss. LEXIS 146 (Miss. 1900).

2.-5. [Reserved for future use.]

II. UNDER FORMER LAW.

6. In general.

Where defendant was indicted for murder, circuit court properly overruled motion to send case to chancery court to determine defendant's insanity. Davis v. State, 151 Miss. 883, 119 So. 805, 1929 Miss. LEXIS 250 (Miss. 1929).

Where the defense is insanity in a prosecution for murder, information obtained from defendant by officers immediately following arrest was admissible. Wallace v. State, 143 Miss. 438, 108 So. 810, 1926 Miss. LEXIS 278 (Miss. 1926).

An instruction with reference to defendant's ability of knowing right from wrong should be confined to the time of the alleged crime. Nelson v. State, 129 Miss. 288, 92 So. 66, 1922 Miss. LEXIS 40 (Miss. 1922).

Where a person has been indicted for murder, after his commitment at the hospital because adjudged a lunatic, a sheriff cannot recover his custody by warrant on such indictment. Mabry v. Hoye, 124 Miss. 144, 87 So. 4, 1920 Miss. LEXIS 536 (Miss. 1920).

A man insane at the time for arraignment should not be arraigned. Howie v. State, 121 Miss. 197, 83 So. 158, 1919 Miss. LEXIS 157 (Miss. 1919), overruled in part, Mitchell v. State, 179 Miss. 814, 176 So. 743, 1937 Miss. LEXIS 84 (Miss. 1937).

Where the accused convicted of a capital offense becomes insane at the time of trial and before judgment, judgment should not be pronounced against him. Howie v. State, 121 Miss. 197, 83 So. 158, 1919 Miss. LEXIS 157 (Miss. 1919), overruled in part, Mitchell v. State, 179 Miss. 814, 176 So. 743, 1937 Miss. LEXIS 84 (Miss. 1937).

OPINIONS OF THE ATTORNEY GENERAL

No authority can be found for a municipality to voluntarily pay the costs to initiate civil commitment proceedings on behalf of a prisoner which are the statutory responsibility of the individual or county of residence. Blakley, Aug. 25, 2006, A.G. Op. 06-0383.

RESEARCH REFERENCES

ALR.

Modern status of test of criminal responsibility–State cases. 9 A.L.R.4th 526.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic"– modern state cases. 33 A.L.R.4th 1062.

Modern status of test of criminal responsibility–federal cases. 56 A.L.R. Fed. 326.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 33, 35 et seq., 45 et seq.

4 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

CJS.

22 C.J.S., Criminal Law §§ 66 et seq.

Law Reviews.

Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring 1990.

Practice References.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

§ 99-13-5. Disposition of an accused who grand jury has found to be insane or a person with an intellectual disability.

When any person is held in prison or on bail, charged with an offense, and the grand jury does not find a true bill for reason of insanity of the accused or for reason that the accused has an intellectual disability, which they judge to be such that he or she was not responsible for his acts or omissions at the time when the act or omission charged was committed or made, the grand jury shall certify the fact to the circuit court and shall state whether or not the insane person or person with an intellectual disability is a danger to the security of persons and property and the peace and safety of the community, and if the grand jury reports that insanity or intellectual disability and that danger, the court shall immediately give notice of the case to the chancellor or to the clerk of the chancery court, whose duty it shall be to proceed with the insane person and his estate or the person with an intellectual disability according to the law provided in the case of persons with mental illness or persons with an intellectual disability.

HISTORY: Codes, 1871, § 2878; 1880, § 3140; 1892, § 1467; 1906, § 1539; Hemingway's 1917, § 1301; Hemingway's 1921 Supp, § 5728x; 1930, §§ 1326, 7287; 1942, §§ 2574, 6777; Laws, 1920, ch. 210; Laws, 2008, ch. 442, § 36; Laws, 2010, ch. 476, § 83, eff from and after passage (approved Apr. 1, 2010.).

Cross References — Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Effect of insanity on motion under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-23, 99-39-27.

JUDICIAL DECISIONS

1. In general.

The grand jury is not required by this section to delay acting on any case to await the outcome of the mental examination of an accused. Williamson v. State, 330 So. 2d 272, 1976 Miss. LEXIS 1844 (Miss. 1976).

RESEARCH REFERENCES

ALR.

Modern status of test of criminal responsibility–States cases. 45 A.L.R.2d 1447.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense. 1 A.L.R.4th 884.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded"–modern cases. 23 A.L.R.4th 493.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic"–modern state cases. 33 A.L.R.4th 1062.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 33, 35 et seq., 45 et seq.

40 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

CJS.

22 C.J.S., Criminal Law §§ 66 et seq.

Law Reviews.

Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

1989 Mississippi Supreme Court Review: Insanity. 59 Miss. L. J. 883, Winter, 1989.

Practice References.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

§ 99-13-7. Acquittal for insanity; presumption of continuing mental illness and dangerousness of person acquitted on ground of insanity; challenge to presumption; hearing; right to counsel.

(1) When any person is indicted for an offense and acquitted on the ground of insanity, the jury rendering the verdict shall state in the verdict that ground and whether the accused has since been restored to his sanity and whether he is dangerous to the community. If the jury certifies that the person is still insane and dangerous, the judge shall order him to be conveyed to and confined in one of the state psychiatric hospitals or institutions.

(2) There shall be a presumption of continuing mental illness and dangerousness of the person acquitted on the ground of insanity. The presumption may be challenged by the person confined to the state psychiatric hospital or institution and overcome by clear and convincing evidence that the person has been restored to sanity and is no longer dangerous to the community. The court ordering confinement of the person to a state psychiatric hospital or institution shall conduct the hearing to determine whether the person has been restored to sanity and is no longer dangerous to the community. The person shall have the right to counsel at the hearing and if the person is indigent, counsel shall be appointed. The provisions of this subsection shall not apply to a person found by the jury to have been restored to sanity and no longer a threat to the community.

HISTORY: Codes 1930, §§ 1327, 1328; 1942, § 2575; Laws, 1932, ch. 237; Laws,

2008, ch. 442, § 37; Laws, 2010, ch. 440, § 1, eff from and after passage (approved Mar. 29, 2010).

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in the introductory language. The word "have" was changed to "has" and the word "be" was changed to "is" so that "...whether the accused have since been restored to his reason, and whether he be dangerous to the community," now reads as "...whether the accused has since been restored to his reason, and whether he is dangerous to the community." The Joint Committee ratified the correction at its August 5, 2008, meeting.

Cross References — Commitment proceedings generally, see § 41-21-63.

Requirements for outpatient commitments, see § 41-21-74.

Acquittal for feeble-mindedness, see § 99-13-9.

Definition of insanity for purposes of suspending death sentence execution, see § 99-19-57.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Release of person committed pursuant to this section and required notice to sheriffs and victims or immediate family member, see § 41-21-88.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Commitment suspension.
3. Indefinite commitment.
4-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

I. UNDER CURRENT LAW.

1. In general.

Jury's verdict was not supported by substantial evidence where the State failed to present sufficient evidence, or any evidence at all, to prove defendant's sanity beyond a reasonable doubt; once the accused had overcome the presumption of sanity, it then became the State's burden to present sufficient evidence to prove the accused's sanity beyond a reasonable doubt, and the testimony of three physicians created a reasonable doubt as to defendant's sanity at the time of the accident. Hawthorne v. State, 881 So. 2d 234, 2003 Miss. App. LEXIS 962 (Miss. Ct. App. 2003), rev'd, 883 So. 2d 86, 2004 Miss. LEXIS 1173 (Miss. 2004).

There are 2 exclusive methods available to courts for committing an individual indefinitely to a state hospital, due to mental disorders. The first method of commitment requires acquittal by a jury on the basis of insanity or feeble-mindedness; § 99-13-7 deals with acquittal of a crime by reason of insanity, and § 99-13-9 provides for acquittal for feeble-mindedness. The second method of indefinite commitment requires a hearing before a chancellor prior to the individual being ordered to the state hospital for treatment and is found in §§ 41-21-61 through 41-21-107. The legislature has not seen fit to bestow upon circuit judges the power to indefinitely commit an individual without the concurrence of a jury or without deferring to the chancellor through §§ 41-21-61 to 41-21-107 and, therefore, commitment of an individual to a state hospital requires more than a mere order by a circuit court judge. Hendrix v. Gammage, 556 So. 2d 354, 1990 Miss. LEXIS 25 (Miss. 1990).

A finding that one is mentally ill does not necessarily mean that one is M'Naghten insane. Davis v. State, 551 So. 2d 165, 1989 Miss. LEXIS 364 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797, 1990 U.S. LEXIS 1741 (U.S. 1990).

A defendant is presumed sane until a reasonable doubt of his or her sanity is created. When such a doubt arises, the burden is then placed upon the State to prove, beyond a reasonable doubt, the defendant's sanity. The issue of a defendant's insanity is a determination for the jury to make, and the finding will not be reversed if it is supported by substantial evidence. In making this determination, the jury may accept or reject expert and lay testimony. Davis v. State, 551 So. 2d 165, 1989 Miss. LEXIS 364 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797, 1990 U.S. LEXIS 1741 (U.S. 1990).

Where testimony that accused's mental condition was such at the time of the crime as to render him incapable of distinguishing between right and wrong was clear, convincing and unequivocal, and the opposing evidence was sketchy, general, and supported only by slight circumstances, the verdict of guilt, with its implicit finding of sanity, was against the overwhelming weight of the evidence. Saunders v. Estate of Horne, 312 So. 2d 700, 1975 Miss. LEXIS 1651 (Miss. 1975).

It is inconsistent with this provision to charge the jury in a criminal case that if they should find defendant not guilty by reason of insanity and certify his dangerousness to the community, it would be the court's duty to commit him to the asylum until he should regain his sanity "at which time he would go free". Gambrell v. State, 238 Miss. 892, 120 So. 2d 758, 1960 Miss. LEXIS 479 (Miss. 1960).

Where the sole defense in a criminal prosecution is insanity, it would be error for the court merely to instruct the jury to bring in a verdict of "not guilty" should they so find the defendant. State v. Goering, 200 Miss. 585, 28 So. 2d 248, 1946 Miss. LEXIS 328 (Miss. 1946).

Statutes providing insanity shall be no defense to murder indictment held violative of due-process clause. Sinclair v. State, 161 Miss. 142, 132 So. 581, 1931 Miss. LEXIS 235 (Miss. 1931).

2. Commitment suspension.

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), aff'd, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

3. Indefinite commitment.

Under Miss. Code Ann. § 99-13-7, if the jury had acquitted defendant on both counts and had found him not to have been restored to reason, but had not found that he was a danger to the community, commitment under that statute would not have been mandatory. Despite the unusual circumstances of the sentencing order, the trial court properly exercised its discretion in requiring defendant to first to serve his mandatory life sentence before his term of an indefinite confinement in a mental institution. Sanders v. State, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

4-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

Where indictment charging defendant with murder was, on motion of state, passed to the files, and defendant was subsequently tried under statutory proceedings for insanity, declared insane, and committed to an asylum by the chancery court, the adjudication of the chancery court did not oust the circuit court of jurisdiction to try defendant for murder. Byrd v. State, 179 Miss. 336, 175 So. 190, 1937 Miss. LEXIS 30 (Miss. 1937).

OPINIONS OF THE ATTORNEY GENERAL

There is no procedure established in Mississippi Code for release of such acquitees upon recovery of sanity; circuit court committing person to mental institution pursuant to Section 99-13-7 of Code retains jurisdiction to authorize release of such person; this may be done by motion of hospital or by committed person; release of patient may be subject to any conditions that are therapeutic in nature, such as continued medication or periodic psychiatric reviews; release may not be conditioned upon patient's meeting punitive restrictions such as are normally placed on paroled convicts. Hendrix Sept. 22, 1993, A.G. Op. #93-0543.

RESEARCH REFERENCES

ALR.

Insanity of accused at time of commission of offense, not raised at trial, as ground for habeas corpus or coram nobis after conviction. 29 A.L.R.2d 703.

Requirement of unanimity of verdict in proceedings to determine sanity of one accused of crime. 42 A.L.R.2d 1468.

Modern status of test of criminal responsibility–State cases. 45 A.L.R.2d 1447.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal. 50 A.L.R.3d 144.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense. 1 A.L.R.4th 884.

Validity of conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity. 2 A.L.R.4th 934.

Modern status of test of criminal responsibility–state cases. 9 A.L.R.4th 526.

"Guilty but mentally ill" statutes: validity and construction. 71 A.L.R.4th 702.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal. 81 A.L.R.4th 659.

Commitment for examination under 18 USCS sec. 4247(b) of defendant giving notice of intention to raise insanity defense to criminal charge. 90 A.L.R. Fed. 902.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 72 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Form 224, (judgment or decree committing defendant as insane).

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Form 225, (warrant for commitment of defendant as insane).

40 Am. Jur. Proof of Facts 2d 171, Defendant's Competency to Stand Trial.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

CJS.

22 C.J.S., Criminal Law §§ 66 et seq.

Law Reviews.

Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

Practice References.

Michael L. Perlin, Mental Disability Law: Civil and Criminal (LexisNexis).

§ 99-13-9. Acquittal on the ground of having an intellectual disability.

When any person is indicted for an offense and acquitted on the ground of having an intellectual disability, the jury rendering the verdict shall state in the verdict that ground and whether the accused constitutes a danger to life or property and to the peace and safety of the community. If the jury certifies that the person with an intellectual disability is dangerous to the peace and safety of the community or to himself, the court shall immediately give notice of the case to the chancellor or the clerk of the chancery court, whose duty it shall be to proceed with the person according to the law provided in the case of persons with an intellectual disability, the person with an intellectual disability himself being remanded to custody to await the action of the chancery court.

HISTORY: Codes, Hemingway's 1921 Supp, § 5728x; 1930, § 7287; 1942, § 6777; Laws, 1920, ch. 210; Laws, 2008, ch. 442, § 38; Laws, 2010, ch. 476, § 84, eff from and after passage (approved Apr. 1, 2010.).

Cross References — Commitment proceedings generally, see § 41-21-63.

Requirements for outpatient commitments, see § 41-21-74.

Acquittal for insanity, see § 99-13-7.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Definition of insanity for purposes of suspending death sentence execution, see § 99-19-57.

JUDICIAL DECISIONS

1. In general.

There are 2 exclusive methods available to courts for committing an individual indefinitely to a state hospital, due to mental disorders. The first method of commitment requires acquittal by a jury on the basis of insanity or feeble-mindedness; § 99-13-7 deals with acquittal of a crime by reason of insanity, and this section provides for acquittal for feeble-mindedness. The second method of indefinite commitment requires a hearing before a chancellor prior to the individual being ordered to the state hospital for treatment and is found in §§ 41-21-61 through 41-21-107. The legislature has not seen fit to bestow upon circuit judges the power to indefinitely commit an individual without the concurrence of a jury or without deferring to the chancellor through §§ 41-21-61 to 41-21-107 and, therefore, commitment of an individual to a state hospital requires more than a mere order by a circuit court judge. Hendrix v. Gammage, 556 So. 2d 354, 1990 Miss. LEXIS 25 (Miss. 1990).

In the prosecution of a 14-year-old mentally retarded defendant for armed robbery, the trial court did not err in refusing to give an instruction that, if the jury found that the defendant was not responsible for his acts because of feeble-mindedness or mental retardation, they should acquit him where there was no evidence that, at the time the defendant committed the criminal act, he did not realize and appreciate the nature and quality thereof and could not distinguish right from wrong. May v. State, 398 So. 2d 1331, 1981 Miss. LEXIS 2021 (Miss. 1981).

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Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 33, 35 et seq., 45 et seq.

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

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§ 99-13-11. Mental examination of person charged with felony; cost.

In any criminal action in which the mental competency of a person charged with a felony is in question, the circuit or county court or judge in vacation on motion duly made by the defendant or the district attorney, or on the motion of the court or judge, may order the person to submit to a mental examination by a competent psychiatrist or psychologist selected by the court to determine his ability to make a defense; any cost or expense in connection with such mental examination shall be paid by the county in which the criminal action is pending.

HISTORY: Codes, 1942, § 2575.5; Laws, 1960, ch. 262; Laws, 1997, ch. 474, § 1; Laws, 1997, ch. 433, § 1, eff from and after July 1, 1997; Laws, 2019, ch. 468, § 2, eff from and after July 1, 2019.

Joint Legislative Committee Note — Section 1 of ch. 474, Laws of 1997, effective from and after passage (approved March 27, 1997) amended this section. Section 1 of ch. 433, Laws of 1997, also amended this section, effective July 1, 1997. As set out above, this section reflects the language of Section 1 of ch. 433, Laws of 1997, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section taking effect earlier.

Amendment Notes — The 2019 amendment substituted “criminal action in which the mental capacity of a person charged with a felony is in question, the circuit or county court” for “criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court”; and made minor stylistic and grammatical changes.

Cross References — Commitment proceedings generally, see § 41-21-63.

Training of psychiatrists and psychologists to perform mental examinations ordered under this section and MRCrP 12, see § 41-21-70.

Procedures regarding prisoner sentenced to death who becomes insane after judgment of court is rendered, see § 99-19-57.

Competency determination, see MRCrP 12.1 through 12.6.

Insanity defense and mental examinations, see MRCrP 17.4.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Grounds for appointment of examiner.
3. Defendant’s right to select examiner.
4. Conduct of examination.
5. Consideration of examination results.
6. Appealability.
7. Miscellaneous.

1. Generally.

In hearing to determine whether or not accused is competent to stand trial, state need not be required to prove competency beyond reasonable doubt or by clear and convincing evidence, where procedures such as those set forth in Emanuel v. State, 412 So. 2d 1187 (Miss. 1982), have been approved by United States Supreme Court see Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)), prosecution at federal level is required to prove competency of criminal defendant by preponderance of evidence, and due process afforded defendant by current procedures preclude need to impose greater burden on state officials. Griffin v. State, 504 So. 2d 186, 1987 Miss. LEXIS 2390 (Miss. 1987).

In hearing to determine defendant's competency to stand trial, evidence must demonstrate probability rather than mere possibility that defendant is incapable of making rational defense, and trial court's decision that evidence does not show such probability will not be overturned unless it can be said that finding was manifestly against overwhelming weight of evidence. Emanuel v. State, 412 So. 2d 1187, 1982 Miss. LEXIS 1928 (Miss. 1982).

In a prosecution for murder, the trial court did not abuse its discretion in refusing to order a further mental study of the defendant where the defendant had previously been examined on several occasions to establish his mental condition and no further evidence was offered to support the request for a further examination. Parcell v. State, 389 So. 2d 1386, 1980 Miss. LEXIS 2138 (Miss. 1980).

Psychiatrist's examination of defendant was inadequate where the psychiatrist himself testified that further examination of the defendant was needed and where his examination of defendant had consisted merely of a one hour and 15 minute interview. Hill v. State, 339 So. 2d 1382, 1976 Miss. LEXIS 1699 (Miss. 1976), cert. denied, 430 U.S. 987, 97 S. Ct. 1689, 52 L. Ed. 2d 384, 1977 U.S. LEXIS 1658 (U.S. 1977).

This section [Code 1942, § 2575.5] does not alter preexisting law, its purpose being merely to authorize the circuit judge to appoint a psychiatrist and to pay for the expense of the examination from county funds. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

The discretion of a judge acting under this provision is a judicial one, requiring some evidential laws. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

Apart from the statutes, the general law permits a court to call expert witnesses for the purpose of examining prisoners and testifying therefrom. Wilson v. State, 243 Miss. 859, 140 So. 2d 275, 1962 Miss. LEXIS 413 (Miss. 1962).

The statute leaves unchanged the requirement that an accused not capable of conducting his defense in a rational manner may not be brought to trial, and merely supplements the former rule requiring the trial judge to empanel a jury to try the issue of competency preliminarily to trial on the merits. McGinnis v. State, 241 Miss. 883, 133 So. 2d 399, 1961 Miss. LEXIS 417 (Miss. 1961).

The purpose of this statute is to avoid placing an accused on trial unless he is at the time capable of conducting a rational defense by intelligently conferring with his counsel. McGinnis v. State, 241 Miss. 883, 133 So. 2d 399, 1961 Miss. LEXIS 417 (Miss. 1961); Frierson v. State, 250 Miss. 339, 165 So. 2d 342, 1964 Miss. LEXIS 467 (Miss. 1964); Tarrants v. State, 236 So. 2d 360, 1970 Miss. LEXIS 1475 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823, 1971 U.S. LEXIS 3245 (U.S. 1971).

2. Grounds for appointment of examiner.

In an aggravated assault case, a trial court did not err by denying the motion for a mental examination under Miss. Unif. Cir. & County Ct. Prac. R. 9.06 and Miss. Code Ann. § 99-13-11; even though defendant's mother testified that he suffered from psychosis, there were no medical records or documentation submitted. Further, despite suffering from psychological ailments, defendant was competent enough to assist counsel in his previous cases, and he was receiving medication at the time of the hearing. Epps v. State, 984 So. 2d 1042, 2008 Miss. App. LEXIS 111 (Miss. Ct. App. 2008).

Defendant's conviction for attempted kidnapping was proper where he failed to present sufficient evidence to support his claim that a mental examination was required. The simple fact that defendant was seeing a psychiatrist did not require that the trial court find that he was incapable of a rational defense or order a mental examination. Carter v. State, 932 So. 2d 850, 2006 Miss. App. LEXIS 77 (Miss. Ct. App.), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 496 (Miss. 2006).

The trial court justly concluded that a mental examination was unnecessary in order to conduct a fair trial, notwithstanding the defendant's assertion that he suffered from periodic loss of memory and occasional blackouts, where the record indicated that the trial judge directed a series of questions to the defense to ensure that the defendant was capable to stand trial, and that, after addressing these questions, the judge concluded that the circumstance indicated that the defendant was fully competent to stand trial. Benish v. State, 733 So. 2d 855, 1999 Miss. App. LEXIS 23 (Miss. Ct. App. 1999).

A trial court did not err in not ordering a competency hearing for a capital murder defendant, in spite of evidence that the defendant took medication for schizophrenia, made a suicide "gesture," and allegedly "heard voices," where there was nothing in the record which, considered in context, led "inexorably to the conclusion that [the defendant] could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A defendant had no right to funds to employ his own psychiatrist where the trial court had granted him a mental examination at a state hospital. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A trial court's denial of a capital murder defendant's request for a private mental examination did not violate the Eighth and Fourteenth Amendments, where the defendant did not attempt to use an insanity defense, the State did not produce psychiatric testimony against him, and he did not demonstrate that sanity was to be a significant factor at trial. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

Denial of a request for further mental examination to determine competency to stand trial was not error where a previous mental examination conducted a month prior to trial had resulted in the determination that the defendant was competent to stand trial. Wheeler v. State, 536 So. 2d 1347, 1988 Miss. LEXIS 607 (Miss. 1988).

Trial court should select and appoint competent psychiatrist to determine defendant's ability to make defense when defendant appears to be incompetent. Gammage v. State, 510 So. 2d 802, 1987 Miss. LEXIS 2641 (Miss. 1987).

The trial court did not abuse its discretion in overruling a motion for a psychiatric examination of a defendant charged with armed robbery where a deputy sheriff testified that during the year that defendant had been in jail he had always appeared normal and rational and had served as a trusty for about three months and where a defense witness admitted that defendant had never been treated for a mental condition or psychiatrically examined. Harris v. State, 386 So. 2d 393, 1980 Miss. LEXIS 2037 (Miss. 1980).

The trial court did not err in denying a psychiatric examination to the defendant in a murder prosecution where the only evidence offered in support of the petition was defendant's own conflicting testimony. Bell v. State, 360 So. 2d 1206, 1978 Miss. LEXIS 2318 (Miss. 1978).

It was error to deny defendant's motion for his commitment and determination of his sanity where three witnesses had testified as to his unusual behavior and had given their opinions that he was not sane, and a fourth witness, a psychiatrist, had testified, based on a limited examination, that defendant was incapable of making a rational defense and that he needed further examination. Stevenson v. State, 325 So. 2d 113, 1975 Miss. LEXIS 1601 (Miss. 1975).

If a person charged with a felony would have a psychiatrist furnished for the purpose of examining his ability to assist in his defense, he must present evidence of the probability that he is unable to assist in his own defense, and the trial judge has reasonable discretion in determining whether such accused should be examined by a psychiatrist. McLeod v. State, 229 So. 2d 557, 1969 Miss. LEXIS 1247 (Miss. 1969).

In order to obtain the services of a psychiatrist under the section [Code 1942, § 2575.5] some evidence must be introduced or some fact acquired from observation of the court, to indicate the necessity of psychiatric aid, and where the only reason given in support of a motion that a psychiatrist be appointed to examine a defendant charged with rape was that "the very nature of the case called for the aid of a psychiatrist", and there was nothing in the record to indicate any mental deficiency of the defendant, the motion was properly overruled. Smith v. State, 229 So. 2d 551, 1969 Miss. LEXIS 1246 (Miss. 1969).

This section [Code 1942, § 2575.5] was intended to cover the mental condition of persons charged with crime, and where the affidavits supporting the defendant's motion for a psychiatric examination failed to allege insanity but only charged that defendant was a chronic alcoholic, the trial judge properly overruled the motion. King v. State, 210 So. 2d 887, 1968 Miss. LEXIS 1535 (Miss. 1968).

The lower court did not abuse its discretion in overruling accused's motion for examination as to his mental ability to stand trial where, although afforded opportunity to do so, he failed, on a hearing upon the motion, to produce evidence to the effect that there was a reasonable probability that he was incapable of making a rational defense. Frierson v. State, 250 Miss. 339, 165 So. 2d 342, 1964 Miss. LEXIS 467 (Miss. 1964).

To warrant an order under this section [Code 1942, § 2575.5], there must be a reasonable probability that accused is not physically and mentally able to confer with his counsel as to the merits of his case and to testify as a witness in his own behalf. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

Before an accused may be subjected to a psychiatric examination before trial, there must be evidence raising a reasonable doubt of insufficient unsoundness of mind to make a rational defense. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

3. Defendant's right to select examiner.

A defendant was not improperly denied the assistance of an independent privately employed psychiatrist in violation of his Sixth, Eighth and Fourteenth Amendment rights where the defendant requested and received a psychiatric examination and evaluation to determine his mental condition, resulting in the unanimous determination of 5 medical professionals that the defendant was sane at the time of the charged offense and was competent to aid in his defense. Lanier v. State, 533 So. 2d 473, 1988 Miss. LEXIS 523 (Miss. 1988).

A murder defendant was not entitled to a private psychologist at the county's expense to assist the defense counsel in establishing mitigating evidence during the sentencing phase where the defendant did not raise the insanity defense at trial, did not claim to be incompetent to stand trial, the State did not produce psychiatric testimony against the defendant in the penalty phase and the defendant failed to demonstrate that his sanity at the time of the offense was to be a significant factor at trial. Nixon v. State, 533 So. 2d 1078, 1987 Miss. LEXIS 2917 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012, 1989 U.S. LEXIS 2745 (U.S. 1989), overruled, Wharton v. State, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

This section [Code 1942, § 2575.5] makes no provision for the appointment of the psychiatrist selected by the defendant. Tarrants v. State, 236 So. 2d 360, 1970 Miss. LEXIS 1475 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823, 1971 U.S. LEXIS 3245 (U.S. 1971); King v. Cook, 297 F. Supp. 99, 1969 U.S. Dist. LEXIS 9067 (N.D. Miss. 1969).

There are no statutory provisions for the appointment and payment of a psychiatrist selected either by the court or the defendant; and defendant's motion for the appointment of a private psychiatrist to examine him was properly overruled. Winston County Community Hospital v. Hathorn, 242 So. 2d 865, 1970 Miss. LEXIS 1393 (Miss. 1970).

This section [Code 1942, § 2575.5] makes no provision for the appointment of a psychiatrist chosen by the defendant, and the trial court has, and should have, the right to select the psychiatrist upon whom it is to depend. King v. State, 210 So. 2d 887, 1968 Miss. LEXIS 1535 (Miss. 1968).

4. Conduct of examination.

Where a well known and recognized psychiatrist, who had been appointed by the court to examine the accused, had observed the accused during the prior sanity hearing and had heard all the witnesses testify, and had examined the accused privately for about 30 minutes, the accused's contention that the psychiatrist's examination was not conducted for a sufficient time for him to exclude all reasonable doubt as to whether the accused knew the difference between right and wrong was not well taken. Wilson v. State, 243 Miss. 859, 140 So. 2d 275, 1962 Miss. LEXIS 413 (Miss. 1962).

5. Consideration of examination results.

The result of an examination under this statute is for consideration by the court and jury in determining, prior to trial on the merits, the issue of present insanity. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

6. Appealability.

An order made under this section [Code 1942, § 2575.5] is not appealable. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

7. Miscellaneous.

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant testified under oath that he understood what he was doing and that his mind was clear, and, additionally, he did not produce any supporting affidavits to the appellate court to establish his alleged mental deficiency, as required by Miss. Code Ann. § 99-39-9(e); thus, the trial judge did not abuse her discretion in not ordering, upon her own motion, a psychiatric evaluation of defendant pursuant to Miss. Code Ann. § 99-13-11 because she determined that the accused was competent to understand the nature of the charges as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(4)(a) and defendant's motion for post-conviction relief was denied. Richardson v. State, 856 So. 2d 758, 2003 Miss. App. LEXIS 946 (Miss. Ct. App. 2003).

The court did not abuse its discretion in refusing to order a mental examination to determine whether the defendant was capable of making a rational defense on his own behalf; although he asserted that he suffered from a memory loss as the result of a closed-head injury sustained in the accident at end of his flight from authorities and that he had absolutely no recollection of the events that transpired, he provided no evidence of his injury or memory loss and the matter was not even raised when the motion was presented. Wilson v. State, 755 So. 2d 2, 1999 Miss. App. LEXIS 215 (Miss. Ct. App. 1999).

Defendant was not competent to stand trial due to finding that he was unable to assist in his defense, where defendant's intelligence quotient was 48 to 52, findings of psychologist concluded that defendant did not possess mental capacity to assist in preparation of defense, and district attorney's motion to pass case to files contained affidavit asking that defendant be committed to mental institution; state's only effort at rebutting evidence of incompetency was effort to prove that defendant had answered questions rationally at his arraignment. Gammage v. State, 510 So. 2d 802, 1987 Miss. LEXIS 2641 (Miss. 1987).

At a hearing on a habeas corpus petition asserting that the sentencing court erred in failing to have a pretrial jury resolve the mental competency of defendant to stand trial, under this section, evidence of psychiatric reports, defendant's testimony at the sentencing hearing, and defendant's attorney's testimony, was sufficient to support findings that defendant knew right from wrong, that he was able to aid his counsel, that he had average or better intelligence, and that he was without psychosis; and thus, there was no reason for the sentencing judge to hold, on his own initiative, any separate hearing as to defendant's competency. Caylor v. State, 437 So. 2d 444, 1983 Miss. LEXIS 2867 (Miss. 1983), cert. denied, 465 U.S. 1032, 104 S. Ct. 1300, 79 L. Ed. 2d 700, 1984 U.S. LEXIS 1188 (U.S. 1984).

In an appeal from a felony conviction, where the appellant filed a motion requesting that his appeal be dismissed and purporting to discharge his attorneys, and counsel of record responded to the request by raising the question whether the appellant was mentally competent to represent himself, the question of his competency was to be determined before passing on the motion, the supreme court would order that the trial court conduct a factual hearing after a mental examination, on the question whether the appellant was competent to represent himself in the case and to know and understand the effect of his motion to dismiss the appeal. Tarrants v. State, 231 So. 2d 493, 1970 Miss. LEXIS 1592 (Miss. 1970).

Habeas corpus is available to an accused to test the validity of an order under this section [Code 1942, § 2575.5]. Jaquith v. Beckwith, 248 Miss. 491, 157 So. 2d 403, 1963 Miss. LEXIS 404 (Miss. 1963).

OPINIONS OF THE ATTORNEY GENERAL

Expenses incurred in mental examination of defendant in criminal action should be borne by county in which action is pending. Hendrix, June 4, 1991, A.G. Op. #91-0379.

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Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition. 32 A.L.R.2d 434.

Admissibility on issue of sanity of expert opinion based partly on medical, psychological or hospital reports. 55 A.L.R.3d 551.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 A.L.R.4th 910.

Modern status of test of criminal responsibility–State cases. 9 A.L.R.4th 526.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense. 17 A.L.R.4th 1274.

Qualification of nonmedical psychologist to testify as to mental condition or competency. 72 A.L.R.5th 529.

Commitment for examination under 18 USCS sec. 4247(b) of defendant giving notice of intention to raise insanity defense to criminal charge. 90 A.L.R. Fed. 902.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 86 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 221-223, (psychiatric examination of accused).

41 Am. Jur. Proof of Facts 2d 615, Insanity Defense.

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

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Indigent criminal defendant held entitled to assistance of psychiatrist when sanity at time of offense is seriously in question. 84 L. Ed. 2d 53.

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CHAPTER 15.

PRETRIAL PROCEEDINGS

In General. 99-15-1
Pretrial Intervention Program. 99-15-101

IN GENERAL

Sec.	
99-15-1.	Conservators of peace; defined.
99-15-3.	Conservators of peace; power to take bonds and recognizances; forfeiture.
99-15-5.	Conservators of the peace; arrest and commitment of offenders.
99-15-7.	Conservators of the peace; prosecutor and witnesses may be required to give bond.
99-15-9.	Conservators of the peace; subpoenas.
99-15-11.	Conservators of the peace; search warrant for stolen property.
99-15-13.	Repealed.
99-15-15.	Appointment of counsel for indigents.
99-15-17.	Compensation of counsel; amount.
99-15-18.	Compensation of counsel in post-conviction relief cases involving the death penalty; submission of interim invoice.
99-15-19.	Compensation of counsel; reimbursement of county in certain cases.
99-15-21.	Compensation of counsel; method of payment.
99-15-23.	Plea entered when defendant stands mute.
99-15-24.	Where to make motions or enter guilty pleas.
99-15-25.	Entry of guilty pleas in vacation; sentencing; records.
99-15-26.	Dismissal of action upon successful completion of certain court-imposed conditions.
99-15-27.	Copy of indictment and special venire to be given defendant in capital cases.
99-15-28.	Accused entitled to copy of affidavit or indictment without cost.
99-15-29.	Continuance; application.
99-15-31.	Continuance; capital cases.
99-15-33.	Continuance; admission of facts in absence of witness.
99-15-35.	Change of venue; how need shown; grounds.
99-15-37.	Change of venue; transfer of records to removal court.
99-15-39.	Change of venue; defendant to be tried on copy of indictment; specific objections to defects in transcript required.
99-15-41.	Change of venue; correcting errors in record.
99-15-43.	Change of venue; capital cases.
99-15-45.	Change of venue; costs paid by county from which venue is changed.
99-15-47.	Joint indictments; severance in felonies.
99-15-49.	Joint indictments; severance in misdemeanors.
99-15-51.	Dismissal of petty misdemeanor charge upon satisfaction of injured party.
99-15-53.	Prosecutions not compromised or nol prossed without consent of court, or dismissed, except at defendant's cost.
99-15-55.	Trial where it appears that accused is only guilty of misdemeanor.
99-15-57.	Relief for certain persons who pled guilty within six months prior to March 31, 1983.
99-15-59.	Expunction of misdemeanor charges.

§ 99-15-1. Conservators of peace; defined.

The judges of the Supreme, circuit and chancery courts and of the court of appeals are conservators of the peace throughout the state, and each judge of the county court and every justice court judge is such within his county.

HISTORY: Codes, 1857, ch. 64, art. 328; 1871, § 2821; 1880, § 3112; 1892, § 1460; 1906, § 1533; Hemingway's 1917, § 1295; 1930, § 1320; 1942, § 2568; Laws, 1996, ch. 385, § 1, eff from and after July 1, 1996.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

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JUDICIAL DECISIONS

1. In general.

No officer should make complaint before magistrate so as to charge suspect with capital or other felony until such officer has had sufficient opportunity to ascertain whether or not such complaint is reasonably justified, and committing magistrate has no jurisdiction to inquire into case until someone is willing to lodge formal charge against accused. Moore v. State, 207 Miss. 140, 41 So. 2d 368, 1949 Miss. LEXIS 324 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516, 1949 U.S. LEXIS 1838 (U.S. 1949).

The words "any conservator of the peace" are limited to the judicial officials designated in this section [Code 1942, § 2568] and do not include a sheriff. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745, 1947 Miss. LEXIS 378 (Miss. 1947).

The words "any conservator of the peace" in § 1321, Code of 1930 [Code 1942, § 2569], are limited to the persons designated as conservators of the peace in § 1320, Code of 1930 [Code 1942, § 2568], and does not embrace all civil officers referred to in Miss Const § 167. Martin v. State, 190 Miss. 32, 199 So. 98, 1940 Miss. LEXIS 188 (Miss. 1940).

A clerk of the circuit court is without power to issue a warrant for the arrest of a person charged with crime by an affidavit lodged with him, and, accordingly, the arrest of one for a felony on a warrant issued by a circuit clerk was illegal, and the bond under which he was set at liberty is void. Martin v. State, 190 Miss. 32, 199 So. 98, 1940 Miss. LEXIS 188 (Miss. 1940).

§ 99-15-3. Conservators of peace; power to take bonds and recognizances; forfeiture.

Any conservator of the peace has power to take all manner of bonds and recognizances from persons charged on affidavit with crimes and offenses, for their appearance in the circuit court to answer thereto, as well as for crimes and offenses committed in their presence. If any person fail to give bond or enter into recognizance, with the sureties prescribed, when required to do so by a conservator of the peace, he shall be committed to the county jail, there to remain until he comply or be otherwise discharged by due course of law. Every bond or recognizance so taken shall be returned to the circuit court before its next term. If any person so bound fail to appear in the circuit court, his bond or recognizance shall be adjudged forfeited, and otherwise proceeded with as provided by law.

HISTORY: Codes, 1857, ch. 64, art. 328; 1871, § 2821; 1880, § 3112; 1892, § 1460; 1906, § 1533; Hemingway's 1917, § 1295; 1930, § 1320; 1942, § 2568.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

JUDICIAL DECISIONS

1. In general.

A deputy clerk, who was neither a judge nor a conservator of the peace, as defined by this section and § 99-15-5, was without authority to issue an arrest warrant; accordingly, the warrant issued by him was invalid. Lanier v. State, 450 So. 2d 69, 1984 Miss. LEXIS 1695 (Miss. 1984).

An indigent defendant charged with aggravated assault and unable to make bail was improperly denied release on her own recognizance where the record was devoid of any consideration by the judicial officer of alternative forms of release and where there was no evidence that there was a substantial risk of nonappearance. On remand to consider whether a form of pretrial release other than money bail would adequately assure defendant's presence at trial, the ABA minimum standards relating to pretrial release would serve as a guide to the judicial officer in making the release decision. Lee v. Lawson, 375 So. 2d 1019, 1979 Miss. LEXIS 2465 (Miss. 1979).

A defendant charged with armed robbery should be granted bail where the proof of his guilt was not evident or the presumption thereof great on the record. Wooton v. Bethea, 209 Miss. 374, 47 So. 2d 158, 1950 Miss. LEXIS 401 (Miss. 1950).

A clerk of the circuit court is without power to issue a warrant for the arrest of a person charged with crime by an affidavit lodged with him, and, accordingly, the arrest of one for a felony on a warrant issued by a circuit clerk was illegal, and the bond under which he was set at liberty is void. Martin v. State, 190 Miss. 32, 199 So. 98, 1940 Miss. LEXIS 188 (Miss. 1940).

OPINIONS OF THE ATTORNEY GENERAL

Justice court judge acting as conservator of peace has authority to set bond or release defendant on recognizance pending action of grand jury or circuit court but bond or recognizance must be returned to circuit court before its next term. Vess, March 18, 1994, A.G. Op. #94-0124.

RESEARCH REFERENCES

ALR.

Bail jumping after conviction, failure to surrender or to appear for sentencing, and the like, as contempt. 34 A.L.R.2d 1100.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

§ 99-15-5. Conservators of the peace; arrest and commitment of offenders.

Any conservator of the peace may, upon a finding of probable cause, by warrant issued under his hand, cause any person charged on affidavit with having committed, or with being suspected of, any offense against the law, to be arrested and brought before him, or before some other conservator of the peace in the proper county. On examination, the conservator of the peace shall commit the offender to jail if the offense be not bailable, and if it be bailable and the offender fail to find bail.

HISTORY: Codes, 1857, ch. 64, art. 329; 1871, § 2822; 1880, § 3113; 1892, § 1461; 1906, § 1534; Hemingway's 1917, § 1296; 1930, § 1321; 1942, § 2569; Laws, 1982, ch. 470, eff from and after passage (approved April 20, 1982).

Cross References — Disposition of insane or feeble-minded offender brought before conservator of the peace, see § 99-13-3.

Preliminary hearings, see MRCrP 6.1, 6.2.

JUDICIAL DECISIONS

1. In general.

A deputy clerk, who was neither a judge nor a conservator of the peace, as defined by § 99-15-3 and this section, was without authority to issue an arrest warrant; accordingly, the warrant issued by him was invalid. Lanier v. State, 450 So. 2d 69, 1984 Miss. LEXIS 1695 (Miss. 1984).

The words "any conservator of the peace" are limited to the officials designated as conservators of the peace in Code 1942, § 2568, and do not include a sheriff. Sheffield v. Reece, 201 Miss. 133, 28 So. 2d 745, 1947 Miss. LEXIS 378 (Miss. 1947).

The words "any conservator of the peace" in § 1321, Code of 1930 [Code 1942, § 2569], are limited to the persons designated as conservators of the peace in § 1320, Code of 1930 [Code 1942, § 2568], and does not embrace all civil officers referred to in Miss Const § 167. Martin v. State, 190 Miss. 32, 199 So. 98, 1940 Miss. LEXIS 188 (Miss. 1940).

RESEARCH REFERENCES

ALR.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 A.L.R.3d 725.

Am. Jur.

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 4 et seq.

§ 99-15-7. Conservators of the peace; prosecutor and witnesses may be required to give bond.

The conservator of the peace may require the prosecutor and witnesses appearing before him, in any case of examination for felony or other crime, to enter into bond or recognizance, in such sum as he may deem proper, with or without security, as he may think the interest of justice to demand, for their appearance to prosecute or give evidence touching the offense, before him on further examination or in the circuit court; and, in default of such bond or recognizance, he may commit the defaulter to jail until he give bail or be otherwise discharged by due course of law.

HISTORY: Codes, 1857, ch. 64, art. 330; 1871, § 2823; 1880, § 3114; 1892, § 1462; 1906, § 1535; Hemingway's 1917, § 1297; 1930, § 1322; 1942, § 2570.

Cross References — Preliminary hearings, see MRCrP 6.1, 6.2.

§ 99-15-9. Conservators of the peace; subpoenas.

A conservator of the peace, in all examinations had before him for offenses, may issue a subpoena to any county, and compel obedience thereto.

HISTORY: Codes, 1857, ch. 64, art. 334; 1871, § 2827; 1880, § 3117; 1892, § 1464; 1906, § 1536; Hemingway's 1917, § 1298; 1930, § 1323; 1942, § 2571.

§ 99-15-11. Conservators of the peace; search warrant for stolen property.

Any conservator of the peace, on the affidavit of a credible person, may issue a search warrant and cause stolen or embezzled goods to be seized; but the affidavit and warrant must specify the goods to be seized and the person or place to be searched.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 1(28); 1857, ch. 64, art. 331; 1871, § 2824; 1880, § 3115; 1892, § 1469; 1906, § 1541; Hemingway's 1917, § 1303; 1930, § 1329; 1942, § 2576.

JUDICIAL DECISIONS

1. In general.

The purpose of a search warrant is merely to authorize the officer to make the search, it does not charge any person with the crime of larceny of the goods, and there is no good reason to require that the affidavit and search warrant shall show the name of the owners of the property, and such a showing is neither necessary nor required by this section [Code 1942, § 2576]. Caldwell v. State, 194 So. 2d 878, 1967 Miss. LEXIS 1419 (Miss. 1967).

An affidavit and search warrant to recover stolen goods is not invalid for failure to state name of owner of goods. Wince v. State, 206 Miss. 189, 39 So. 2d 882, 1949 Miss. LEXIS 253 (Miss. 1949).

Justice of the peace is not required to mark an affidavit in support of a search warrant "filed" under Code 1942, § 1812, which provides that criminal cases are begun by "lodging" the affidavit with the justice of the peace. Wince v. State, 206 Miss. 189, 39 So. 2d 882, 1949 Miss. LEXIS 253 (Miss. 1949).

Failure of police officer making search

for stolen articles pursuant to lawful affidavit and search warrant to make a return thereon does not invalidate search or make incompetent testimony as to articles recovered by the search. Wince v. State, 206 Miss. 189, 39 So. 2d 882, 1949 Miss. LEXIS 253 (Miss. 1949).

RESEARCH REFERENCES

ALR.

Distribution of truth of matters stated in affidavit in support of search warrant–modern cases. 24 A.L.R.4th 1266.

Lawyers' Edition.

Requirement, under Federal Constitution, that person issuing warrant for arrest or search be neutral and detached magistrate. 32 L. Ed. 2d 970.

§ 99-15-13. Repealed.

Repealed by Laws, 1980, ch. 555, § 9, eff from and after July 1, 1980.

§ 99-15-13. [Codes, 1930, § 1363; 1942, § 2610; Laws, 1926, ch. 165; Laws, 1964, 1st Ex Sess ch. 22, § 1]

Editor's Notes — For provisions regarding the Mississippi Justice Information Center and maintenance and submission of records, fingerprints, photographs and other data, see §§ 45-27-1 et seq.

§ 99-15-15. Appointment of counsel for indigents.

When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may, in the discretion of the court, appoint counsel to defend him.

Such appointed counsel shall have free access to the accused who shall have process to compel the attendance of witnesses in his favor.

The accused shall have such representation available at every critical stage of the proceeding against him where a substantial right may be affected.

HISTORY: Codes, 1942, § 2505-01; Laws, 1971, ch. 490, § 2; reenacted without change, Laws, 1999, ch. 375, § 1; reenacted without change, Laws, 2000, ch. 332, § 1; reenacted without change, Laws, 2001, ch. 375, § 1, eff from and after July 1, 2001.

Editor's Notes — Laws of 1998, ch. 575, § 20, as amended by Laws of 1999, ch. 375, § 2, as amended by Laws of 2000, ch. 332, § 2, and as amended by Laws of 2001, ch. 375, § 2, which provided for the repeal of § 99-15-15, was repealed by Laws of 2002, ch. 315, § 1.

Laws of 1998, ch. 575, § 21, effective July 1, 1998, provides:

"SECTION 21. (1) All new programs authorized under this Senate Bill No. 2239 shall be subject to the availability of funds specifically appropriated therefor by the Legislature during the 1998 Regular Session or any subsequent session. This act shall be codified but no amendment to a code section or repeal of a code section enacted by this Senate Bill No. 2239 shall take effect until the Legislature has funded any new programs authorized hereunder by line item appropriation, said line item appropriation to be certified by the Legislative Budget Office to the Secretary of State.

"(2) Notwithstanding any other provision of this act, the only actions authorized under this act to be funded shall be the hiring of the executive director, the hiring of a secretary for the executive director, expenses necessary for the operation of the commission and the executive director's office and expenses incidental thereto, and providing per diem for the members of the commission unless other legal funding as authorized under this act other than by appropriation of the Legislature is available. The commission shall assess the feasibility and cost of the implementation of this act and report its findings to the Legislature not later than January 1, 1999. This subsection (2) shall stand repealed on July 1, 1999."

Cross References — Compensation for counsel for indigents appointed as provided in this section, see § 99-15-17.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Reimbursement of country in certain cases for compensation of counsel, § 99-15-19.

Appointment of interpreters in criminal cases for defendant declared indigent, see § 99-17-7.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Benefit of effective counsel.
3. Appellate counsel.

1. Generally.

When denying defendant's request for funds to hire an expert, it was error to base the denial on defendant's lack of indigency because the court found defendant was indigent when appointing counsel for defendant. Barksdale v. State, 176 So. 3d 108, 2015 Miss. App. LEXIS 184 (Miss. Ct. App.), cert. denied, 178 So. 3d 333, 2015 Miss. LEXIS 525 (Miss. 2015).

A trial judge's remark at the beginning of trial that defense counsel was appointed, though not particularly commendable, did not amount to reversible error. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A defendant's right to counsel had not attached at the time of a pre-indictment line up where the record did not reflect that the defendant was or reasonably ought to have been charged with a crime prior to that time. Nixon v. State, 533 So. 2d 1078, 1987 Miss. LEXIS 2917 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012, 1989 U.S. LEXIS 2745 (U.S. 1989), overruled, Wharton v. State, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

Refusal to grant continuance on third trial of prosecution for rape, which trial took place some two weeks after employment of new counsel for defendant, did not constitute a denial of defendant's right to effect a representation by counsel contrary to the Fourteenth Amendment of the United States Constitution, where more than two years had elapsed since the commission of the offense, such counsel had advantage of voluminous and comprehensive briefs, records and opinions of the court in two previous trials and the assistance of two investigators to help them in preparing for the trial. McGee v. State, 40 So. 2d 160 (Miss.), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487, 1949 U.S. LEXIS 1886 (U.S. 1949).

2. Benefit of effective counsel.

Defendant was not entitled to appointed counsel in pursuing further discretionary review following affirmance of conviction; thus, defendant could not claim ineffective assistance based on counsel's failure to inform him of affirmance in time to file timely petition for rehearing. Harris v. State, 704 So. 2d 1286, 1997 Miss. LEXIS 47 (Miss.), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47, 1997 U.S. LEXIS 4857 (U.S. 1997).

3. Appellate counsel.

Inmate was not entitled to court-appointed counsel at his post-conviction relief evidentiary hearing and appeal under Miss. Code Ann. §§ 99-39-23(1) and 99-15-15 as the record revealed no need for appointment of counsel for post-trial or appellate proceedings. Higginbotham v. State, 114 So. 3d 9, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. 2012), cert. denied, 116 So. 3d 1072, 2013 Miss. LEXIS 317 (Miss. 2013).

A defendant is entitled to appointment of counsel in connection with the automatic review of a death sentence. Jackson v. State, 732 So. 2d 187, 1999 Miss. LEXIS 56 (Miss. 1999).

Defendant in criminal proceedings is not entitled to continued assistance of appointed defense counsel where defendant seeks certiorari. Harris v. State, 704 So. 2d 1286, 1997 Miss. LEXIS 47 (Miss.), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47, 1997 U.S. LEXIS 4857 (U.S. 1997).

Appointed counsel is not required by State Constitution, statutes, or rules at postconviction relief stages of the appellate process, even though there is a right to file such proceedings. Harris v. State, 704 So. 2d 1286, 1997 Miss. LEXIS 47 (Miss.), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47, 1997 U.S. LEXIS 4857 (U.S. 1997).

OPINIONS OF THE ATTORNEY GENERAL

The court appointed attorney may be reimbursed for fees and expenses incurred in representing the defendant up to the point in time that he was prohibited from practicing law; thereafter, he would be legally unable to represent the defendant and therefore, could not charge any fee for representation. Pouncy, Dec. 18, 1991, A.G. Op. #91-0868.

Judge has discretion in setting reasonable fees for counsel appointed for indigents under this section, and may award less than $1,000. Rogers, Jan. 8, 1993, A.G. Op. #92-0936.

If one of the public defenders has a conflict of interest in a case then another public defender should handle the case. If a conflict exists such that no public defender may represent the defendant then the justice court judge has authority to appoint counsel as allowed under this section. Burton, June 21, 1996, A.G. Op. #96-0385.

An indigent defendant charged with a misdemeanor is entitled to legal representation by the public defender where a substantial right may be affected, e.g., when the defendant faces imprisonment for any length of time. Belk, Jr., June 30, 2000, A.G. Op. #2000-0360.

RESEARCH REFERENCES

Am. Jur.

8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Form 41.5, 42.

46 Am. Jur. Trials 571, Strategies for Enforcing the Right to Effective Representation.

Law Reviews.

Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-15-17. Compensation of counsel; amount.

The compensation for counsel for indigents appointed as provided in Section 99-15-15, shall be approved and allowed by the appropriate judge and in any one (1) case may not exceed one thousand dollars ($1000.00) for representation in circuit court whether on appeal or originating in said court. Provided, however, if said case is not appealed to or does not originate in a court of record, the maximum compensation shall not exceed two hundred dollars ($200.00) for any one (1) case, the amount of such compensation to be approved by a judge of the chancery court, county court or circuit court in the county where the case arises. Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars ($2,000.00) per case. If the case is appealed to the state supreme court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed one thousand dollars ($1000.00) per case. In addition, the judge shall allow reimbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

HISTORY: Codes, 1942, § 2505-02; Laws, 1971, ch. 490, § 3; Laws, 1974, ch. 428; Laws, 1980, ch. 444, eff from and after October 1, 1980.

Editor's Notes — The 1980 amendment increasing the amount of compensation to which appointed counsel is entitled is effective from and after October 1, 1980.

Cross References — Applicability of this section to counsel appointed by court as substitute for, or in addition to, public defender, see § 25-32-13.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Reimbursement of county in certain cases for compensation of counsel, see § 99-15-19.

Method of payment of compensation of counsel, see § 99-15-21.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.

1. In general.

Defense counsel was sufficiently compensation where he was awarded $32.10 per hour for his actual overhead; the figure was based on an initial amount of $25.00 per hour for overhead and was adjusted upwards for inflation. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

Attorney who received $11,000 from criminal defendant for trial representation, which amount was greater than that which he would have been entitled to by law ($2,000 for trial and appeal), was not entitled to receive more money from county for appellate representation, even though defendant was declared indigent after trial. Hunt v. State, 687 So. 2d 1154, 1996 Miss. LEXIS 426 (Miss. 1996).

Under statute which provides that defense counsel may receive maximum of $1,000 for criminal trial and $1,000 in appeal fees, additional monies for defense counsel's overhead expenses may also to be paid. Hunt v. State, 687 So. 2d 1154, 1996 Miss. LEXIS 426 (Miss. 1996).

A justice court is a "court of record" as contemplated by this section; thus, appointed counsel who was representing indigent defendants at preliminary hearings in justice court was not limited to a fee of $200 per case plus out-of-pocket expenses. Gibson v. Board of Supervisors, 656 So. 2d 312, 1995 Miss. LEXIS 275 (Miss. 1995).

This section, which limits the compensation which an attorney may receive for the representation of an indigent, does not amount to an unconstitutional taking of an attorney's property, deprive indigent defendants of the effective assistance of counsel, or violate the equal protection clause. The statute allows for "reimbursement of actual expenses," which can be interpreted to include reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case; there is a rebuttable presumption that a court-appointed attorney's actual overhead within the statute is $25 per hour. This construction of this section will allow an attorney to receive $1,000 in profit plus his or her actual expenses. A rebuttal presumption arises that the actual cost contemplated by the statute is the average of $25 per hour; this figure may be subject to change when the 1988 survey conducted by the Mississippi State Bar is updated. The trial court is bound by the $25 per hour figure only when proof to the contrary is not forthcoming. The hours submitted by an attorney are subject to scrutiny under a reasonable and necessary standard. Specific expenses must be approved by the court before the attorney incurs the expenses. Court approved expenses include, but are not limited to, such items as the cost of an investigator, the cost of an expert witness, and a trip to interview witnesses. This interpretation of the statute avoids unconstitutionality on all grounds. Wilson v. State, 574 So. 2d 1338, 1990 Miss. LEXIS 842 (Miss. 1990).

Although this section allows for the appointment of 2 attorneys in capital cases, a defense counsel's withdrawal of his motion for the appointment of additional counsel did not constitute ineffective assistance of counsel where the defense counsel withdrew the motion because he had successfully developed the case and the case was not so complex that one attorney could not provide a legally sufficient defense. Marks v. State, 532 So. 2d 976, 1988 Miss. LEXIS 425 (Miss. 1988).

The trial court in a capital murder prosecution did not err in denying defendant's attorneys a reasonable amount by way of expenses in order to conduct an investigation into the mood and attitude of the community toward defendant in the furtherance of his motion for change of venue, notwithstanding the provisions of this section, where defendant had failed to outline any specific cost for the investigation. Billiot v. State, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

This section does not mandate that two attorneys be appointed to represent an indigent defendant in a capital case, but merely provides that two attorneys may be appointed. Smith v. State, 445 So. 2d 227, 1984 Miss. LEXIS 1592 (Miss. 1984).

The matter of compensation of an attorney appointed to represent an indigent defendant is a matter resting with the legislature as a legislative function. Young v. State, 255 So. 2d 318, 1971 Miss. LEXIS 1286 (Miss. 1971).

An attorney's fee in the amount of $150, allowed under former Code 1942, § 2505 at the time of the trial, was not so inadequate as to be tantamount to a denial of due process of law as provided by the constitutions of the United States and of the State of Mississippi. Young v. State, 255 So. 2d 318, 1971 Miss. LEXIS 1286 (Miss. 1971).

2. Constitutionality.

County was properly denied declaratory judgment that Miss. Code Ann. §§ 25-32-7, and 99-15-17, requiring counties to provide legal services for indigent criminal defendants violated Miss. Const. art. III, § 26 because the county did not show specific examples of when public defenders' legal representation fell below the objective standard of professional reasonableness. Quitman County v. State, 910 So. 2d 1032, 2005 Miss. LEXIS 438 (Miss. 2005).

OPINIONS OF THE ATTORNEY GENERAL

The court appointed attorney may be reimbursed for fees and expenses incurred in representing the defendant up to the point in time that he was prohibited from practicing law; thereafter, he would be legally unable to represent the defendant and therefore, could not charge any fee for representation. Pouncy, Dec. 18, 1991, A.G. Op. #91-0868.

In context of this section, "court of record" is generic term, and refers to court where there is record for use on appeal. Rogers, Jan. 8, 1993, A.G. Op. #92-0936.

When a county public defender is appointed to represent a defendant on felony charges in a municipal court preliminary hearing, the court should allow the public defender to withdraw if the felony charges are reduced to misdemeanors, the court should then determine if a court appointed attorney is appropriate on the misdemeanor charges, and if the public defender is appointed to represent the defendant on the misdemeanor charges, then the public defender is entitled to additional compensation from the municipality under this section. Tucker, Aug. 15, 1997, A.G. Op. #97-0500.

A municipal court is a "court of record" for purposes of Section 99-15-17 and, therefore, attorney's fees in excess of $200.00 plus out-of-pocket may be awarded in felony cases being heard in municipal court. Smith, June 9, 2006, A.G. Op. 06-0225.

RESEARCH REFERENCES

ALR.

Right of court-appointed attorney to contract with his indigent client for fee. 43 A.L.R.3d 1426.

Validity and construction of state statute or court rule fixing maximum fees for attorney appointed to represent indigent. 3 A.L.R.4th 576.

Validity, construction, and application of state recoupment statutes permitting state to recover counsel fees expended for benefit of indigent criminal defendants. 39 A.L.R.4th 597.

Right of indigent defendant in state criminal case to assistance of investigators. 81 A.L.R.4th 259.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 A.L.R.4th 19.

Necessity or Propriety of Court's Provision of Cocounsel to Criminal Defendant Who Is Already Represented by Counsel – State Prosecutions. 83 A.L.R.6th 465.

Propriety of order under subsection (f) of Criminal Justice Act of 1964 (18 USCS § 3006(A)(f)) directing payment by or on behalf of party for services of court-appointed counsel. 51 A.L.R. Fed. 561.

Am. Jur.

2B Am. Jur. Pl & Pr Forms (Rev), Attorneys at Law, Form 270 (complaint, petition, or declaration against county for writ of mandamus to compel county to pay costs of representing indigent defendant in criminal action, court revoked finding of indigency subsequent to representation).

8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Form 43.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

Morris, Constitutional law: validity of attorney fee caps in indigent cases: Mississippi' challenge. 9 Miss. College L. R. 373, Spring, 1989.

Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-15-18. Compensation of counsel in post-conviction relief cases involving the death penalty; submission of interim invoice.

(1) Counsel employed by an office funded by the State of Mississippi or any county shall receive no compensation or expenses for representation of a

party seeking post-conviction relief while under a sentence of death other than the compensation attendant to his office.

(2) Unless employed by such an office, counsel appointed to represent a party seeking post-conviction relief while under a sentence of death shall be paid at an hourly rate not to exceed eighty percent (80%) of the hourly rate allowed in the United States District Courts of the Northern and Southern Districts of Mississippi to attorneys appointed to represent defendants seeking habeas corpus relief.

(3) Counsel shall submit to the trial court, once each month, an interim invoice. Compensation earned and reimbursable expenses incurred each month shall be claimed on an interim invoice submitted not later than the fifteenth day of the following month, or the first business day thereafter. All interim vouchers shall be supported by detailed and itemized time and expense statements. The trial court shall review the interim invoices when submitted and will authorize compensation to be paid for seventy-five percent (75%) of the approved number of hours. The court shall also authorize for payment all reimbursable expenses, including fees and expenses of experts and of investigators, reasonably incurred. At the conclusion of the state-paid post-conviction representation, counsel shall submit a final voucher seeking payment for representation provided during the final interim period. The final invoice shall also set forth in detail the time and expenses claimed for the entire case, including all documentation. Counsel shall reflect all compensation and reimbursement previously received on the appropriate line of the final invoice. Upon review and approval of the final invoice, the trial court shall authorize compensation to be paid for the approved number of hours provided during the final interim period, for all reasonable expenses reasonably incurred during the final interim period, and for the withheld twenty-five percent (25%) of hours approved in prior interim periods.

(4) All interim invoices will be maintained under seal during the pendency of state post-conviction proceedings. Upon submission by defendant's counsel of a final invoice, the trial court shall unseal the interim invoices unless the trial court determines that petitioner's interest requires a limited disclosure. In determining whether limited disclosure is appropriate, the trial court shall consider the need: (a) to protect the petitioner's Fifth Amendment right against self-incrimination; (b) to protect the petitioner's Sixth Amendment right to effective assistance of counsel; (c) the petitioner's attorney-client privilege; (d) the work product privilege of the petitioner's counsel; (e) the safety of any person; (f) whether petitioner intends to seek federal habeas corpus relief; and (g) any other interest that justice may require.

(5) Prior to payment of any fees in a case in excess of Seven Thousand Five Hundred Dollars ($7,500.00) or expenses of investigation and experts in excess of Two Thousand Five Hundred Dollars ($2,500.00), the application for such fees and expenses will be submitted to the Supreme Court for review of the award of the convicting court. If counsel believes that the court has failed to allow reasonable compensation, counsel may petition the Supreme Court for review. If counsel is appointed in successive post-conviction proceedings, such

counsel shall receive reasonable compensation considering the services performed.

(6) The trial court shall also, upon petition by the party seeking post-conviction relief, authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate the post-conviction claims. The initial petition for such expenses shall present a credible estimate of anticipated expenses, and such estimate shall be updated from time to time as needed to inform the court of the status of such expenses. Payment of such expenses shall be made from funds in the Special Capital Post-Conviction Counsel Fund.

HISTORY: Laws, 2000, ch. 569, § 15; Laws, 2001, ch. 526, § 1, eff from and after July 1, 2001.

Editor's Notes — Laws of 2000, ch. 569, § 1, effective July 1, 2000, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.' "

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

Cross References — Method of payment of compensation of counsel, see § 99-15-21.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Special Capital Post-Conviction Counsel Fund created, see § 99-39-117.

RESEARCH REFERENCES

Law Reviews.

Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-15-19. Compensation of counsel; reimbursement of county in certain cases.

Any county paying counsel fees and expenses incurred on appeal to the supreme court or by virtue of any prosecution charging the commission of a crime on the premises of the Mississippi State Penitentiary or the commission of a crime by any escapee therefrom, may request reimbursement of all such payments from the state treasurer. The state auditor shall issue his warrant, based upon a voucher sent by the treasurer of any county entitled to such reimbursement together with a certification that such sums have been allowed and paid. The state treasurer shall pay the amount of any such reimbursement out of any funds in the state treasury appropriated for such purpose.

HISTORY: Codes, 1942, § 2505-02; Laws, 1971, ch. 490, § 3, eff from and after passage (approved April 5, 1971).

Editor's Notes — Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal

Officer whenever they appear. Section 27-104-6 provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

Cross References — Method of payment of compensation of counsel, see § 99-15-21.

§ 99-15-21. Compensation of counsel; method of payment.

All compensation and reimbursements allowed by the judge shall be made on the basis of an itemized statement as to time and nature of work and the expense incurred by the appointed counsel. The attorney general shall prepare and make available the proper form for the itemized statement which is to be submitted to the appropriate judge by the attorney or attorneys. Compensation and reimbursements authorized by Sections 99-15-15 through 99-15-21 shall be allowed only in cases in which the appointment is made subsequent to April 5, 1971. In all cases in which counsel have been appointed prior to said date, compensation shall be allowed in the same manner and to the same extent as provided by law at the time such appointment was made.

HISTORY: Codes, 1942, § 2505-03; Laws, 1971, ch. 490, § 4, eff from and after passage (approved April 5, 1971).

OPINIONS OF THE ATTORNEY GENERAL

The district attorney must determine the amount of expenses incurred by a pretrial intervention program, and such expenses will be made a part of the initial agreement between the district attorney and the offender; the terms of such an agreement must be approved by the court having jurisdiction. Anderson, August 27, 1999, A.G. Op. #99-0421.

The Department of Corrections (DOC) should contact the district attorneys to inform them of the expenses that are being incurred as a result of the DOC field support personnel supervising offenders in pretrial intervention programs; the district attorney may then put such expenses in the initial agreement between the D.A. and the offender and may stipulate the method and manner of paying those expenses, i.e., directly to MDOC. Anderson, August 27, 1999, A.G. Op. #99-0421.

Payments made by an offender in a pretrial intervention program may be used to partially fund the salary of the assistant district attorney having pretrial intervention program duties. Knochel, Feb. 24, 2005, A.G. Op. 05-0090.

Where the court has ordered a defendant pay a fine and let him out of jail, he should not be imprisoned during the time allotted for payment of the fine. Beckett, Oct. 20, 2006, A.G. Op. 06-0482.

RESEARCH REFERENCES

ALR.

Right of indigent defendant in state criminal case to assistance of investigators. 81 A.L.R.4th 259.

Am. Jur.

2B Am. Jur. Pl & Pr Forms (Rev), Attorneys at Law, Form 270 (complaint, petition, or declaration against county for writ of mandamus to compel county to pay costs of representing indigent defendant in criminal action, court revoked finding of indigency subsequent to representation).

§ 99-15-23. Plea entered when defendant stands mute.

If the defendant, on arraignment, refuses or neglects to plead, or stands mute, the court must cause the plea of "not guilty" to be entered, and the trial to proceed.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(51); 1857, ch. 64, art. 293; 1871, § 2757; 1880, § 3056; 1892, § 1407; 1906, § 1480; Hemingway's 1917, § 1238; 1930, § 1261; 1942, § 2504.

Cross References — Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

Arraignment, see MRCrP 15.1.

Pre-trial publicity regarding the failure of the defendant to make any statement, see MRCrP 18.9.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Plea by attorney.
3. Waiver of arraignment.
4. Withdrawal of plea.

1. Generally.

Although a defendant was entitled to a preliminary hearing, he was not prejudiced by the lack of one where he was afforded ample opportunity through his pretrial hearings to confront the State's witnesses. Rogers v. State, 599 So. 2d 930, 1992 Miss. LEXIS 123 (Miss.), overruled in part, Mayfield v. State, 612 So. 2d 1120, 1992 Miss. LEXIS 861 (Miss. 1992).

One charged with a felony must plead to an indictment in person. Mareno v. State, 226 So. 2d 905, 1969 Miss. LEXIS 1331 (Miss. 1969).

This section [Code 1942, § 2504] precludes a nolo contendere plea in a felony case. Bruno v. Cook, 224 So. 2d 567, 1969 Miss. LEXIS 1294 (Miss. 1969).

Arraignment and plea are not jurisdictional under this section [Code 1942, § 2504] and failure of the record to show them will not cause reversal where the objection was not made as required by law. Arbuckle v. State, 80 Miss. 15, 31 So. 437, 1902 Miss. LEXIS 219 (Miss. 1902).

Before a person charged with crime can be put upon his trial, he must plead to the indictment or the issue must be made up for him. Sartorious v. State, 24 Miss. 602, 1852 Miss. LEXIS 110 (Miss. 1852).

2. Plea by attorney.

One charged with a felony must plead to an indictment in person, and a plea of "guilty" entered by his attorney is invalid. Mareno v. State, 226 So. 2d 905, 1969 Miss. LEXIS 1331 (Miss. 1969).

3. Waiver of arraignment.

A defendant effectively waived his right to a preliminary hearing when he agreed to, and executed with sureties, a recognizance bond. Joseph v. State, 524 So. 2d 576, 1988 Miss. LEXIS 204 (Miss. 1988).

In a prosecution for murder the court properly arraigned the defendant by entering for him a plea of "not guilty" when he stood mute in response to charges read to him by the court, where defendant's failure to reply to any of the charges in the indictment was on the advice of counsel due to the possibility that the arraignment might be improper and any pleas entered might constitute a waiver. Crossley v. State, 420 So. 2d 1376, 1982 Miss. LEXIS 2253 (Miss. 1982).

Defendant may waive arraignment either expressly or impliedly. Williams v. State, 205 Miss. 515, 39 So. 2d 3, 1949 Miss. LEXIS 448 (Miss. 1949).

Action of court in placing defendant, without arraignment, on trial for felonious assault with a deadly weapon with intent to steal and in entering a plea of "not guilty" on his behalf is not error, when defendant impliedly waives his right to arraignment by unjustly feigning insanity at time of trial as the jury found and standing mute when the trial court tendered an arraignment. Williams v. State, 205 Miss. 515, 39 So. 2d 3, 1949 Miss. LEXIS 448 (Miss. 1949).

Where defendant was tried on two indictments for felonious assault on two persons and the state elected to ask for a verdict on only one of them, the fact that defendant was not arraigned on such indictment is of no consequence since he is deemed to have waived any objections thereto by participating fully in the trial in all of its aspects without objection to his arraignment. Lowe v. State, 201 Miss. 618, 30 So. 2d 53, 1947 Miss. LEXIS 428 (Miss. 1947).

An arraignment is not jurisdictional and may be waived by the defendant. Thomas v. State, 200 Miss. 220, 26 So. 2d 469, 1946 Miss. LEXIS 286 (Miss. 1946).

An accused employing capable and reputable attorneys present with him at every step taken after return of the indictment, waives objection that he was at no time arraigned, if he is present and takes any part at all in the trial without raising the point except to move for a directed verdict after the state rests. Thomas v. State, 200 Miss. 220, 26 So. 2d 469, 1946 Miss. LEXIS 286 (Miss. 1946).

Arraignment is waived where defendant takes part in the trial without objection as to the arraignment. Thomas v. State, 200 Miss. 220, 26 So. 2d 469, 1946 Miss. LEXIS 286 (Miss. 1946); Lowe v. State, 201 Miss. 618, 30 So. 2d 53, 1947 Miss. LEXIS 428 (Miss. 1947).

4. Withdrawal of plea.

Negro involved in a shooting scrape who, without benefit of counsel at arraignment under indictments charging manslaughter and assault and battery with intent to kill, stated that he was guilty of the shooting, whereupon the court entered orders that defendant pleaded guilty to the indictment, should have been permitted to withdraw the pleas of guilty made the following day before sentence supported by affidavit and uncontradicted evidence that defendant did not understand that he was pleading guilty to the charges in the indictment and that he had a meritorious defense, even though the defendant responded at the arraignment that he knew what he was doing and that he did not want a lawyer. Pittman v. State, 198 Miss. 797, 23 So. 2d 685, 1945 Miss. LEXIS 249 (Miss. 1945).

RESEARCH REFERENCES

ALR.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Awareness of collateral consequences of plea, and competency to enter plea. 10 A.L.R.6th 265.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant – State cases. 11 A.L.R.6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea. 12 A.L.R.6th 389.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Particular circumstances as constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel. 13 A.L.R.6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Newly discovered or available evidence, and possible defense. 14 A.L.R.6th 517.

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 560.

§ 99-15-24. Where to make motions or enter guilty pleas.

In criminal cases in circuit courts, unless otherwise provided by law, guilty pleas may be taken and motions may be heard in any county in the circuit court district that contains the county in which venue lies. Nothing in this section shall be construed as affecting venue for the purpose of bringing indictments or the conducting of jury trials.

HISTORY: Laws, 1986, ch. 347, eff from and after July 1, 1986.

JUDICIAL DECISIONS

1. In general.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351, 2011 Miss. App. LEXIS 364 (Miss. Ct. App. 2011).

Defendant's offense was charged to have been committed in Lee County, which was in the First Circuit Court District, Miss. Code Ann. § 9-7-5, and any other circuit court in the First Circuit Court District could have accepted defendant's guilty plea, Miss. Code Ann. § 99-15-24; the Monroe County Circuit Court was in the First Circuit Court District, Miss. Code Ann. § 9-7-5, and therefore the Monroe County Circuit Court was an appropriate venue for defendant's guilty plea to the Lee County charge, and thus all of defendant's arguments dependent on the impropriety of the venue for the plea were without merit. Garner v. State, 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006), cert. dismissed, 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Where defendant answered questions from trial judge under oath, on the record, and in presence of counsel, during his plea hearing denying any coercion in pleading guilty, defendant's claim that his plea was involuntary was properly rejected. Bradley v. State, 845 So. 2d 756, 2003 Miss. App. LEXIS 432 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR.

Place of holding sessions of trial court as affecting validity of its proceedings. 18 A.L.R.3d 572.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

Venue in rape cases where crime is committed partly in one place and partly in another. 100 A.L.R.3d 1174.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Awareness of collateral consequences of plea, and competency to enter plea. 10 A.L.R.6th 265.

Propriety of sentencing judge's imposition of harsher sentence than offered in connection with plea bargain rejected or withdrawn plea by defendant – State cases. 11 A.L.R.6th 237.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Assertion or finding of innocence and defendant's knowledge or waiver of other particular rights at time of plea. 12 A.L.R.6th 389.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Particular circumstances as constituting grounds for withdrawal, excluding issues of knowledge, factual basis, competency, evidence, defenses, sentencing and punishment, and ineffective assistance of counsel. 13 A.L.R.6th 603.

Presentence withdrawal of plea of nolo contendere or non vult contendere under state law – Newly discovered or available evidence, and possible defense. 14 A.L.R.6th 517.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 555 et seq.

CJS.
22 C.J.S., Criminal Law §§ 141 et seq.

§ 99-15-25. Entry of guilty pleas in vacation; sentencing; records.

(1) Any person who is charged in any circuit or county court with the commission of a criminal offense by a proper affidavit, indictment or information in cases of misdemeanors or by indictment by the grand jury in cases of felonies, and who is represented by counsel, may, by his own election, appear before the judge of the court at such time as the said judge may fix in vacation of the court and be arraigned and enter a plea of guilty to the offense with which he is charged. Upon the entering of such plea of guilty, the judge shall have the power and authority to impose any lawful and proper sentence upon the defendant in vacation just as though the plea was entered and the sentence imposed during a regular term of the court.

(2) All judgments and orders imposing sentences in vacation upon such pleas of guilty shall be entered upon the minutes of the proper court in vacation just as though same were had and entered during term time.

HISTORY: Codes, 1942, § 2564.5; Laws, 1960, ch. 259, §§ 1, 2.

Cross References — Arraignment, see MRCrP 15.1.
Entry of guilty pleas in vacation, see MRCrP 15.2 through 15.4.
Time of sentencing, see MRCrP 26.5.
Sentencing, see MRCrP 26.4 through 26.8.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Waiver of rights by plea.
3. —Exceptions.
4. Withdrawing guilty plea.
5. Rescinding plea bargain agreement.
6. Plea to crime not charged in indictment.

1. In general.

Where defendant answered questions from trial judge under oath, on the record, and in presence of counsel, during his plea hearing denying any coercion in pleading guilty, defendant's claim that his plea was involuntary was properly rejected. Bradley v. State, 845 So. 2d 756, 2003 Miss. App. LEXIS 432 (Miss. Ct. App. 2003).

Guilty plea is voluntary if defendant knows what elements are in charge against him or her, including understanding of charges and its relation to defendant, effect of plea, and possible sentence. Taylor v. State, 682 So. 2d 359, 1996 Miss. LEXIS 532 (Miss. 1996).

Complete record should be made of plea proceeding to ensure that defendant's plea was entered voluntarily. Taylor v. State, 682 So. 2d 359, 1996 Miss. LEXIS 532 (Miss. 1996).

Judge is required by Uniform Criminal Rules of Circuit Court Practice, Rule 3.03 to "address" accused and determine that he understands nature and consequences of plea of guilty, including maximum and minimum penalties. Wolfe v. Puckett, 780 F. Supp. 408, 1991 U.S. Dist. LEXIS 18019 (N.D. Miss. 1991), aff'd, 998 F.2d 1014, 1993 U.S. App. LEXIS 19452 (5th Cir. Miss. 1993).

Before a trial court may accept a guilty plea, it must have before it substantial evidence that the accused did commit the legally defined offense to which he or she is offering the plea. What facts must be shown are a function of the definition of the crime and its assorted elements. A factual showing does not fail merely because it does not flush out the details which might be brought forth at trial. Rules of evidence may be relaxed at plea hearings, and fair inference favorable to guilt may facilitate the finding. There must be enough that the court may say with confidence that the prosecution could prove the accused guilty of the crime charged. Thus, there was an adequate factual basis for a defendant's plea of guilty to murder, even though the defendant advised the trial court at the plea hearing that he "didn't do the shooting," where the defendant admitted that he was at the crime scene, the prosecution's summary of the proof showed guilt and was made in the defendant's presence, and, even taking the defendant's version of the facts, it was fairly inferrable that a third party shot and killed the victim under circumstances where the defendant was an accessory before the fact. Corley v. State, 585 So. 2d 765, 1991 Miss. LEXIS 591 (Miss. 1991).

A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him or her, including an understanding of the charge and its relation to him or her, what effect the plea will have, and what the possible sentence might be because of the plea. Where a defendant is not informed of the maximum and minimum sentences he or she might receive, his or her guilty plea has not been made either voluntarily or intelligently. A complete record should be made to ensure that the defendant's guilty plea is voluntary. While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal. Wilson v. State, 577 So. 2d 394, 1991 Miss. LEXIS 179 (Miss. 1991).

The fact that a defendant pled guilty to armed robbery in exchange for a 7-year sentence did not broaden the circuit court's sentencing authority; it was still statutorily limited. Mitchell v. State, 561 So. 2d 1037, 1990 Miss. LEXIS 258 (Miss. 1990).

Before a person may plead guilty to a felony, he or she must be informed of his or her rights, the nature and consequences of the act he or she contemplates, and any other relevant facts and circumstances. Thus, a defendant who was not advised of the mandatory minimum sentence for the charge to which he was pleading, and who was ignorant of the mandatory minimum sentence at the time he plead guilty, was entitled to withdraw his plea of guilty, enter a plea of not guilty and be given a trial, since the failure to advise the defendant of the minimum penalty rendered his guilty plea involuntary as a matter of law. Vittitoe v. State, 556 So. 2d 1062, 1990 Miss. LEXIS 39 (Miss. 1990).

2. Waiver of rights by plea.

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. Anderson v. State, 577 So. 2d 390, 1991 Miss. LEXIS 180 (Miss. 1991).

A guilty plea operates to waive the defendant's privilege against self-incrimination, the right to confront and cross-examine the prosecution's witnesses, the right to a jury trial, and the right that the prosecution prove each element of the offense beyond a reasonable doubt. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

3. —Exceptions.

The entry of a knowing and voluntary guilty plea waives all other defects or insufficiencies in the indictment, with only 2 exceptions; the principle exception to the general rule is that the failure of the indictment to charge a criminal offense or, more specifically, to charge an essential element of a criminal offense, is not waived, and additionally, a guilty plea does not waive subject matter jurisdiction. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

4. Withdrawing guilty plea.

A defendant who was not eligible for a

suspended sentence or probation because he had previously been convicted of a felony would be permitted to withdraw his guilty plea where he pled guilty because of a plea bargain which included a recommendation by the State that he be given a suspended sentence. Robinson v. State, 585 So. 2d 757, 1991 Miss. LEXIS 604 (Miss. 1991).

5. Rescinding plea bargain agreement.

A district attorney did not have unilateral authority to rescind a plea bargain agreement on the basis that the defendant had lied to him about certain key information even though the language of the "memorandum of understanding" gave the district attorney the right to rescind the agreement at any point if the defendant was untruthful. The question of whether a defendant failed to perform a condition precedent is an issue not to be finally determined unilaterally by the government, but by the court on the basis of adequate evidence. Danley v. State, 540 So. 2d 619, 1988 Miss. LEXIS 640 (Miss. 1988).

6. Plea to crime not charged in indictment.

A defendant waived his right to indictment for grand larceny, and thus his conviction for grand larceny could be used subsequently to sentence the defendant as a habitual offender, where the defendant was originally indicted for the burglary of 2 automobiles, the defendant appeared before the circuit court and testified under oath that he understood that he was charged with burglary of an automobile in each case, that he wished to withdraw his pleas of not guilty and enter pleas of guilty to related charges of grand larceny, that he understood the nature of the offense of grand larceny, and that he in fact committed those crimes. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

A plea of guilty to a crime separate and distinct from the crime charged in the indictment and not a constituent offense thereof is void and of no effect since the Mississippi Constitution requires indictment by a grand jury before a prosecution may be had. Grayer v. State, 519 So. 2d 438, 1988 Miss. LEXIS 52 (Miss. 1988).

RESEARCH REFERENCES

ALR.

Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain. 3 A.L.R.4th 1181.

Judge's participation in plea bargaining negotiations as rendering accused's guilty plea involuntary. 10 A.L.R.4th 689.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 A.L.R.4th 1089.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial. 17 A.L.R.4th 61.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 A.L.R.4th 251.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment–modern state cases. 28 A.L.R.4th 1121.

Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized. 87 A.L.R.4th 384.

Degree of mental competence, required of accused who pleads guilty, sufficient to satisfy requirement, of Rule 11 of Federal Rules of Criminal Procedure, that guilty pleas be made voluntarily and with understanding. 31 A.L.R. Fed. 375.

Practice References.

G. Nicholas Herman, Plea Bargaining (Michie).

§ 99-15-26. Dismissal of action upon successful completion of certain court-imposed conditions.

(1)(a) In all criminal cases, felony and misdemeanor, other than crimes against the person, a crime of violence as defined in Section 97-3-2, a violation of Section 97-11-31, or crimes in which a person unlawfully takes, obtains or misappropriates funds received by or entrusted to the person by virtue of his or her public office or employment, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant made on or after July 1, 2014, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(c) Notwithstanding paragraph (a) of this subsection (1), in all criminal cases charging a misdemeanor of domestic violence as defined in Section 99-3-7(5), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(d) No person having previously qualified under the provisions of this section shall be eligible to qualify for release in accordance with this section for a repeat offense. A person shall not be eligible to qualify for release in accordance with this section if charged with the offense of trafficking of a controlled substance as provided in Section 41-29-139(f) or if charged with an offense under the Mississippi Implied Consent Law. Violations under the Mississippi Implied Consent Law can only be nonadjudicated under the provisions of Section 63-11-30.

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:

(i) Reasonable restitution to the victim of the crime.

(ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.

(iii) Payment of a fine not to exceed the statutory limit.

(iv) Successful completion of drug, alcohol, psychological or psychiatric treatment, successful completion of a program designed to bring about the cessation of domestic abuse, or any combination thereof, if the court deems treatment necessary.

(v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

(b) Conditions which the circuit or county court may impose under subsection (1) of this section also include successful completion of an effective evidence-based program or a properly controlled pilot study designed to contribute to the evidence-based research literature on programs targeted at reducing recidivism. Such program or pilot study may be community based or institutionally based and should address risk factors identified in a formal assessment of the offender's risks and needs.

(3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.

(4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

HISTORY: Laws, 1983, ch. 446, §§ 1-4; Laws, 1987, ch. 364; Laws, 1989, ch. 565, § 2; Laws, 1996, ch. 391, § 1; Laws, 1996, ch. 454, § 3; Laws, 2003, ch. 557, § 2; Laws, 2004, ch. 455, § 1; Laws, 2007, ch. 549, § 1; Laws, 2008, ch. 458, § 2; Laws, 2012, ch. 514, § 12; Laws, 2014, ch. 457, § 9; Laws, 2015, ch. 463, § 6; Laws, 2015, ch. 478, § 1, eff from and after July 1, 2015; Laws, 2019, ch. 362, § 4, eff from and after July 1, 2019; Laws, 2019, ch. 466, § 41, eff from and after July 1, 2019; § 41, eff from and after July 1, 2019.

Joint Legislative Committee Note — Section 6 of ch. 463, Laws of 2015, effective July 1, 2015 (approved April 20, 2015), amended this section. Section 1 of ch. 478, Laws of 2015, effective July 1, 2015 (approved April 22 2015) also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision, and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision, and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 17, 2015, meeting of the Committee.

Section 4 of Chapter 362, Laws of 2019, effective upon passage (approved March 21, 2019), amended this section. Section 41 of Chapter 466, Laws of 2019, effective July 1, 2019 (approved April 16, 2019), also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision, and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision, and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 12, 2019, meeting of the Committee.

Editor's Note — Laws of 2019, ch. 466, § 1 provides as follows:

"SECTION 1. This act shall be known and may be cited as the 'Criminal Justice Reform Act.' "

Amendment Notes — The first 2019 amendment (ch. 362), in (1)(a), inserted "or crimes in which a person…his or her public office or employment" and made a related change.

The second 2019 amendment (ch. 466) added "or the person was found not guilty at trial" at the end of (5), and made a related change.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual nonadjudicated on felony or misdemeanor case under this section, see § 45-1-29.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Provisions for relief for persons who pled guilty within six months prior to March 31, 1983, see § 99-15-57.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

Mississippi implied consent law, see § 63-11-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Malicious prosecution.
3. Post-conviction relief.
4. Judicial Misconduct.

1. In general.

Petitioner's criminal records pertaining to the two counts against the petitioner which were remanded to file based on the petitioner's guilty plea to one other count were eligible for expungement when the petitioner subsequently received a full, complete, and unconditional pardon from the Governor of Mississippi. However, there was no statutory basis for expungement of the record of the criminal conviction for which the petitioner was pardoned. Polk v. State, 150 So. 3d 967, 2014 Miss. LEXIS 497 (Miss. 2014).

Trial court properly denied movant's motion to expunge a drunk driving conviction from movant's record as Miss. Code Ann. § 99-15-26 expressly prohibited expungement for persons such as movant who were charged with an offense under the Mississippi Implied Consent Law; the doctrine of equitable expungement was not available to movant because circuit courts lacked the inherent power to order expungement, and thus, the requirements of § 99-15-26 controlled. Eubanks v. State, 53 So. 3d 846, 2011 Miss. App. LEXIS 65 (Miss. Ct. App. 2011).

Had the State had sufficient evidence to retry the citizen for his 1979 arrest, it should have done so within the next 25 years, and the appellate court found that the trial court was without discretion to deny his motion to expunge the 1979 arrest following the 2003 amendment to Miss. Code Ann. § 99-15-26. A.E.W. v. State, 925 So. 2d 136, 2006 Miss. App. LEXIS 110 (Miss. Ct. App. 2006).

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former requires the entry of a sworn guilty plea before the circuit or county court while the latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect the attorney's felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. Miss. Bar v. Cofer, 904 So. 2d 97, 2004 Miss. LEXIS 1032 (Miss. 2004), dismissed, 2011 Miss. LEXIS 253 (Miss. May 12, 2011).

Under Miss. Code Ann. § 99-15-26, if defendant successfully completes certain court-imposed conditions, the cause against defendant is dismissed and the case closed. As a result, a conditional dismissal pursuant to § 99-15-26 is different than a suspended sentence pursuant to Miss. Code Ann. § 47-7-33; consequently, defendant, who pled guilty and received a suspended sentence was not entitled to have the conviction expunged under Miss. Code Ann. § 99-15-26. Turner v. State, 876 So. 2d 1056, 2004 Miss. App. LEXIS 605 (Miss. Ct. App. 2004).

Trial court lacked jurisdiction to expunge defendant's criminal record because the trial court did not withhold acceptance of her guilty plea when defendant pled on September 23, 1996; the trial court sentenced defendant to regular probation; because defendant was not sentenced under Miss. Code Ann. § 99-15-26, her argument was without merit. Smith v. State, 869 So. 2d 425, 2004 Miss. App. LEXIS 251 (Miss. Ct. App. 2004).

Because an attorney entered a valid plea of guilty to charges of bribery under Miss. Code Ann. § 97-11-11, pursuant to the requirements of Miss. R. Disc. St. B. 6, the attorney demonstrated evidence of unprofessional and unethical conduct evincing unfitness for the practice of law, which warranted immediate suspension, and while the plea might later be withdrawn, the court found that this provided the attorney no relief from the application of Rule 6; furthermore, the court had the power to render immediate sanctions for admitted felonies under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. B. 6 without a hearing by a complaint tribunal. Miss. Bar v. Shelton, 890 So. 2d 827, 2003 Miss. LEXIS 448 (Miss. 2003), limited, Miss. Bar v. Cofer, 904 So. 2d 97, 2004 Miss. LEXIS 1032 (Miss. 2004).

The trial court properly imposed a sentence upon the defendant for his original crime where (1) the court specifically withheld acceptance of the defendant's guilty plea in accordance with the statute pending successful completion of two years non-adjudication probation, and (2) the defendant failed to make payments for restitution and court costs that had been ordered by the court as conditions of probation. Porter v. State, 777 So. 2d 671, 2001 Miss. LEXIS 37 (Miss. 2001).

Although there was no proof that a judge willfully intended to misuse this section, where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing, she violated this section. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961, 2000 Miss. LEXIS 27 (Miss. 2000).

The Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of this section and Rule 6 of the Rules of Discipline for the Mississippi Bar. Mississippi Bar v. Baldwin, 752 So. 2d 996, 1999 Miss. LEXIS 389 (Miss. 1999).

Subsection (4) of this section gives circuit and county court judges the discretion to expunge the record of any person whose case was dismissed or whose charges were dropped or if there was no disposition of such case, including cases involving crimes against the person. McGrew v. State, 733 So. 2d 816, 1999 Miss. LEXIS 98 (Miss. 1999).

A trial court's imposition of a sentence of 49 ½ years imprisonment upon finding that the defendant had violated a plea agreement which provided that the charges against the defendant would be dismissed following restitution and 3 years of good behavior pursuant to this section, in spite of the defendant's argument that the maximum sentence he should have received was 3 years since the plea bargain required him to "go straight" for only 3 years as a condition of dismissal, since the defendant had not been adjudged guilty or sentenced for the original charges until the date when the 49 ½ year sentence was imposed, and therefore the 3-year period of conditional good behavior did not amount to a sentencing ceiling for double jeopardy purposes. Wallace v. State, 607 So. 2d 1184, 1992 Miss. LEXIS 586 (Miss. 1992).

In proceedings under this section, the trial court never accepts the guilty plea and never imposes a sentence if the defendant fulfills the court-imposed conditions; where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior because to do so would expose the defendant to double jeopardy. Wallace v. State, 607 So. 2d 1184, 1992 Miss. LEXIS 586 (Miss. 1992).

A trial court may employ a lesser standard of proof than "beyond a reasonable doubt" in determining whether a defendant has violated the conditions of a dismissal under this section; thus, a trial court did not abuse its discretion by ruling that a defendant had violated the conditions of his dismissal under this section where the defendant had not yet been tried for the crimes constituting the violations. Wallace v. State, 607 So. 2d 1184, 1992 Miss. LEXIS 586 (Miss. 1992).

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of Mississippi has specifically authorized expungment of criminal offender records in limited cases-youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungment of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that any person who pled guilty within 6 months prior to the effective date of this section (March 31, 1983) may apply to the court for an order expunging his or her criminal records. Under § 99-15-57 and this section a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to § 99-15-57 and this section if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the "within 6 months prior to" March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the criterion in any of the statutes authorizing expungment, and thus the trial court did not err in denying his petition for expungment. Caldwell v. State, 564 So. 2d 1371, 1990 Miss. LEXIS 262 (Miss. 1990).

Under this section, if the court-imposed conditions are not successfully completed, then the court is empowered to accept the guilty plea and impose sentence thereon. A defendant does not have a right to withdraw a guilty plea made under the provisions of this section. Brown v. State, 533 So. 2d 1118, 1988 Miss. LEXIS 530 (Miss. 1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 936, 1989 U.S. LEXIS 1629 (U.S. 1989).

This section authorizes the court to place a defendant on probation even though it does not use the specific word "probation." Brown v. State, 533 So. 2d 1118, 1988 Miss. LEXIS 530 (Miss. 1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 936, 1989 U.S. LEXIS 1629 (U.S. 1989).

2. Malicious prosecution.

Arrestee's claim for malicious prosecution on charges of conspiracy to plant drugs lacked merit where the criminal proceeding did not terminate in the arrestee's favor because the arrestee pled guilty to a lesser crime of trespassing; the officers' motion for summary judgment was granted. Scribner v. Dillard, 269 F. Supp. 2d 716, 2003 U.S. Dist. LEXIS 16862 (N.D. Miss. 2003).

3. Post-conviction relief.

Although petitioner had pleaded guilty, that plea was not accepted and instead he received five years of nonadjudicated probation, and he was later released from such and his charges were dismissed, and thus he was not convicted nor sentenced in accordance with the statute and thus lacked standing to file a post-conviction relief motion, and the dismissal of his motion was affirmed; the nonadjudication of guilt resulting in dismissal of charges is not a conviction or sentence within the purview of the Mississippi Uniform Post-Conviction Relief Act. Alsahquni v. State, 150 So. 3d 159, 2014 Miss. App. LEXIS 633 (Miss. Ct. App. 2014).

4. Judicial Misconduct.

Judge violated Miss. Code Ann. § 99-15-26(2)(a)(v) and Miss. Code Jud. Conduct Canons 1, 2(A), 3(B)(2) and (8), and 3(C)(1) because the judge kept drug court participants in the program over two years. Miss. Comm'n on Judicial Performance v. Thompson, 169 So. 3d 857, 2015 Miss. LEXIS 242 (Miss. 2015).

OPINIONS OF THE ATTORNEY GENERAL

Non-adjudication statute, Miss. Code Section 99-15-26, does not exempt records of non-adjudication from Public Records Act. Brown, June 4, 1993, A.G. Op. #93-0356.

This section, which allows judge to withhold adjudication upon defendant's completion of certain conditions, specifically does not apply to any offense under the Mississippi Implied Consent Law. Stephens, Jan. 12, 1994, A.G. Op. #93-0889.

Subsection (4) is not applicable to records of pretrial intervention programs. Spann, Jan. 24, 2000, A.G. Op. #99-0694.

Subsection (4) may only be used when a case is dismissed or charges are dropped or there is no disposition of a case; if a defendant is convicted, that conviction may not be expunged under the statute. Spann, March 17, 2000, A.G. Op. #2000-0106.

The statute applies only to circuit or county courts and not to justice courts. Knight, Apr. 5, 2002, A.G. Op. #02-0152.

Where, pursuant to the provisions of this section, acceptance of a plea of guilty by a school board candidate is being withheld pending successful completion of the conditions set forth in an order of nonadjudication, there has been no conviction and, therefore, if the election commission finds that the individual in question is a qualified elector, has no previous felony convictions and meets all residency and other qualifications to hold the office, he would be eligible to have his name placed on the ballot. Lagasse, Sept. 27, 2002, A.G. Op. #02-0560.

A situation in which a co-tenant out of possession made tax payments to the county for a period of over twenty years following a tax sale since the co-tenant had no knowledge that said property was not in their possession any longer was subject to the requirement that a refund for erroneously paid taxes may only be made for taxes that were paid within three years prior to the date the petition seeking such refunds was filed with the board of supervisors. Griffith, Sept. 12, 2003, A.G. Op. 03-0423.

Defendant charged with exploitation of children under § 97-5-33(2) is not eligible for non-adjudication under this section. Terry, Sept. 5, 2003, A.G. Op. 03-0450.

Simple domestic violence as defined in § 97-3-7(3), is a crime against the person. Municipal courts may not utilize the provisions of subsection (1) of this section to non-adjudicate criminal defendants charged with and pleading guilty to the offense of simple assault or simple domestic violence. Dawson, Jan. 23, 2004, A.G. Op. 04-0019.

This section necessarily implies that the Department of Corrections has the authority to accept limited custody of persons for the sole purpose of participating in and completing a Regimented Inmate Discipline (RID) Program as a condition of non-adjudication. Such person would not be an "inmate" or a "convict." Epps, Aug. 20, 2004, A.G. Op. 04-0275.

Where the Department of Insurance has received an application for licensing as a bail agent from a person who pled guilty to a felony, but pursuant to Section 99-15-26, the court did not accept the guilty plea, there has been no conviction of a felony for purposes of Section 83-39-3(2)(a); however, Section 83-39-9 requires an applicant to submit proof of good moral character, thus, the Department may examine the behavior and conduct leading to the guilty plea and make a determination as to whether the applicant has good moral character. Dale, May 20, 2005, A.G. Op. 05-0213.

Upon petition by the defendant, the court shall expunge a grand larceny charge if it determines the provisions of the statute have been met, which determination might include that there was no disposition of the case after two years. Brooks, May 19, 2006, A.G. Op. 06-0187.

RESEARCH REFERENCES

ALR.

State court's power to place defendant on probation without imposition of sentence. 56 A.L.R.3d 932.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 A.L.R.4th 778.

Admissibility of evidence of other offense where record has been expunged or erased. 82 A.L.R.4th 913.

Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute. 68 A.L.R.6th 1.

Judicial Expunction of Criminal Record of Convicted Adult Under Statute – General Principles, and Expunction of Criminal Records Under Statutes Providing for Such Relief Where Criminal Proceeding Is Terminated in Favor of Defendant, upon Completion of Probation, upon Suspended Sentence, and Where Expungement Relief Predicated upon Type, and Number, of Offenses. 68 A.L.R.6th 1.

Judicial Expunction of Criminal Record of Convicted Adult Under Statute-Expunction Under Statutes Addressing "First Offenders" and "Innocent Persons," Where Conviction Was for Minor Drug or Other Offense, Where Indictment Has Not Been Presented Against Accused or Accused Has been Released from Custody, and Where Court Considered Impact of *Nolle Prosequi,* Partial Dismissal, Pardon, Rehabilitation, and Lesser-Included Offenses. 70 A.L.R.6th 1.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 841 et seq.

§ 99-15-27. Copy of indictment and special venire to be given defendant in capital cases.

Any person indicted for a capital crime shall, if demanded by him by motion in writing before the completion of drawing of any special venire which is summoned to appear on the day of his trial, have a copy of the indictment and list of the special venire delivered to him or his counsel at least one (1) entire day before said trial.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(49); 1857, ch. 64, art. 294; 1871, § 2758; 1880, § 3057; 1892, § 1408; 1906, § 1481; Hemingway's 1917, § 1239; 1930, § 1262; 1942, § 2505; Laws, 1900, ch. 99; Laws, 1934, ch. 303; Laws, 1950, ch. 351; Laws, 1964, ch. 357; Laws, 1971, ch. 490, § 1; Laws, 1985, ch. 443, § 2, eff from and after July 1, 1985.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Necessity of written demand.
3. Time of demand.
4. Time of delivery.
5. Necessity of true copy.
6. Waiver.

1. Generally.

Procedure for special venire is available to persons accused of certain serious crimes as matter of right, and such persons are entitled to have sheriff proceed in good faith and with due diligence to end that all persons listed upon special venire in fact be served and summoned for jury duty; it is not within sheriff's authority to decide unilaterally that there will be enough jurors at trial and make no further effort to summon unserved jurors after certain number of persons have been served. Ratliff v. State, 515 So. 2d 877, 1987 Miss. LEXIS 2874 (Miss. 1987).

Defendant in a capital murder prosecution waived his request pursuant to § 13-5-77 and this section for a special venire and for a list of the veniremen so summoned, where he never objected to the failure to provide for the special venire, and where at least fifty jurors were considered prior to impaneling the twelve jurors and two alternates. Billiot v. State, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

One cannot complain that he did not obtain a special venire where, when court set aside its denial and offered to direct drawing of one, he withdrew his motion and announced readiness for trial. Ross v. State, 234 Miss. 309, 106 So. 2d 56, 1958 Miss. LEXIS 492 (Miss. 1958).

Under this section [Code 1942, § 2505] providing for delivery of copy of return of special venire to defendant or his counsel, it is not error to deliver it to defendant, even though request has been made for its delivery to his lawyer. Simmons v. State, 208 Miss. 586, 45 So. 2d 149, 1950 Miss. LEXIS 276 (Miss. 1950).

This section [Code 1942, § 2505] complied with where certified copy of indictment and special venire were delivered to defendant on a Friday night preceding trial which was set for a following Monday notwithstanding defendant's objection that it was not effective because of alleged illiteracy of defendant where defendant's counsel was notified of the action on Saturday morning. Patton v. State, 207 Miss. 120, 40 So. 2d 592, 1949 Miss. LEXIS 322 (Miss.), cert. denied, 338 U.S. 855, 70 S. Ct. 104, 94 L. Ed. 523, 1949 U.S. LEXIS 1796 (U.S. 1949).

List of special venire and copy of indictment need not be served on accused by sheriff. Ivey v. State, 154 Miss. 60, 119 So. 507, 1928 Miss. LEXIS 198 (Miss. 1928).

The prisoner is not entitled to a copy of the regular venire for the statute only gives him a right to a copy of the special one. McCarty v. State, 26 Miss. 299, 1853 Miss. LEXIS 93 (Miss. 1853).

2. Necessity of written demand.

Forcing defendant to trial without serving copy of indictment and special venire before trial held not error, where not demanded by written motion. Gregory v. State, 152 Miss. 133, 118 So. 906, 1928 Miss. LEXIS 235 (Miss. 1928).

That copy of special venire was delivered before trial did not entitle defendant to demand copy of indictment without written motion. Gregory v. State, 152 Miss. 133, 118 So. 906, 1928 Miss. LEXIS 235 (Miss. 1928).

3. Time of demand.

Although a special venire could have been demanded in an armed robbery prosecution if the demand had been timely made, the trial court did not abuse its discretion in overruling the defendant's motion for a special venire where the motion was made just prior to the start of trial. Williams v. State, 590 So. 2d 1374, 1991 Miss. LEXIS 801 (Miss. 1991).

A copy of the indictment and of the special venire and summons must be demanded before completion of the drawing of the special venire. Estes v. State, 127 Miss. 309, 90 So. 80, 1921 Miss. LEXIS 229 (Miss. 1921).

It is too late on motion to quash the venire for the accused to demand a list of the venire. Collier v. State, 106 Miss. 613, 64 So. 373, 1913 Miss. LEXIS 169 (Miss. 1913).

Under Code 1892, § 1408 [Code 1942, § 2505], it is within the judicial discretion of the court to deny a motion for a list of the special venire where the motion is not made until after the completion of the drawing of the venire. Hannah v. State, 87 Miss. 375, 39 So. 855, 1905 Miss. LEXIS 142 (Miss. 1905).

4. Time of delivery.

Service of copy of indictment and special venire on accused at 4:50 o'clock on afternoon of day before trial held not "one entire day before the trial." Winchester v. State, 163 Miss. 462, 142 So. 454, 1932 Miss. LEXIS 63 (Miss. 1932).

"One entire day before trial" in this section [Code 1942, § 2505] means a day counted from midnight to midnight. Boatwright v. State, 120 Miss. 883, 83 So. 311, 1919 Miss. LEXIS 141 (Miss. 1919); O'Quinn v. State, 131 Miss. 511, 95 So. 513, 1923 Miss. LEXIS 199 (Miss. 1923);

Winchester v. State, 163 Miss. 462, 142 So. 454, 1932 Miss. LEXIS 63 (Miss. 1932).

5. Necessity of true copy.

The fact that a summoned juror, who was present at court in a murder prosecution, and served on the panel without challenge for cause, was shown by the sheriff's return to have been "not found", did not constitute reversible error for failure to furnish defendant a true copy of the special venire upon request, in the absence of any showing that there was any censorable failure to find such juror, or that he was not duly qualified to serve as such. Davis v. State, 203 Miss. 574, 35 So. 2d 524, 1948 Miss. LEXIS 308 (Miss. 1948).

The fact that four jurors, who were drawn and summoned by the sheriff, did not appear at the trial of the murder prosecution, did not constitute reversible error for failure to furnish defendant a true copy of the special venire upon request, where there was no showing of prejudice from the failure of those summoned to appear, or that further compulsory process was resorted to without effect. Davis v. State, 203 Miss. 574, 35 So. 2d 524, 1948 Miss. LEXIS 308 (Miss. 1948).

A mistake in the copy of the special venire by which the Christian names of the persons summoned are misrecited, if it occur by inadvertence and if no injury to the prisoner be occasioned thereby, is not a sufficient ground to sustain his objection to proceeding with the trial. Browning v. State, 33 Miss. 47, 1856 Miss. LEXIS 234 (Miss. 1856).

The name of the same juror appearing twice on the venire without any collusion or improper design and without any real injury shown to have been done the prisoner by it, is not ground for error. McCarty v. State, 26 Miss. 299, 1853 Miss. LEXIS 93 (Miss. 1853).

6. Waiver.

Right of accused under this section [Code 1942, § 2505] to have copy of indictment delivered to him may be waived. Simmons v. State, 208 Miss. 586, 45 So. 2d 149, 1950 Miss. LEXIS 276 (Miss. 1950).

Statement by trial judge that accused waived requirement of this section [Code 1942, § 2505] that copy of indictment be delivered to him must be given great weight by supreme court on appeal of defendant from judgment of conviction. Simmons v. State, 208 Miss. 586, 45 So. 2d 149, 1950 Miss. LEXIS 276 (Miss. 1950).

RESEARCH REFERENCES

ALR.

Determination of indigency of accused entitling him to appointment of counsel. 51 A.L.R.3d 1108.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

§ 99-15-28. Accused entitled to copy of affidavit or indictment without cost.

Any person alleged to have committed a criminal offense in violation of a state law, or ordinance of any political subdivision, which upon conviction carries a sentence of any length of time or fine of any amount, shall be entitled, upon request made by such person or their counsel, to receive a copy of the affidavit or indictment at any time after such affidavit is filed or indictment returned, provided that any person alleged to have committed a felony shall not be entitled to receive a copy of the indictment until after his arrest or apprehension, and such indictment shall be governed according to the provisions of Section 99-7-13, Mississippi Code of 1972, until such time as the person is arrested or apprehended. No charge or fee shall be imposed for any copy of an affidavit or indictment as herein provided.

HISTORY: Laws, 1973, ch. 367, § 1, eff from and after passage (approved March 23, 1973).

Cross References — Secret record of indictments, see § 99-7-13.

RESEARCH REFERENCES

Am. Jur.
21A Am. Jur. 2d, Criminal Law §§ 1169.

CJS.
21A C.J.S., Criminal Law § 1257 et seq.

§ 99-15-29. Continuance; application.

On all applications for a continuance the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or documents that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done. The court may grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom.

HISTORY: Codes, 1857, ch. 61, art. 151; 1871, § 633; 1880, § 1704; 1892, § 723; 1906, § 784; Hemingway's 1917, § 567; 1930, § 576; 1942, § 1520.

Cross References — Continuances where counsel is legislator, see § 11-1-9.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Granting of continuances for noncompliance with discovery, see MRCrP 17.9.

JUDICIAL DECISIONS

ANALYSIS

1. Discretion of court.
2. —In particular circumstances.
3. Requisites and sufficiency of application and affidavit.
4. —Properly granted.
5. —Properly denied.
6. Cross-examination of affiant.
7. Time for application.
8. Grounds for continuance, generally.
9. —Time to prepare for trial; properly granted.
10. — —Properly denied.
11. —Absence of witness; properly granted.
12. — —Properly denied.
13. —Illness of witness; properly granted.

14. — —Properly denied.
15. —Absence of documents and other evidence.
16. —Absence or illness of defendant.
17. Miscellaneous.
18. Due diligence.
19. Setting aside continuance.
20. Appeal.

1. Discretion of court.

Trial court did not abuse its discretion in denying defendant's motion for a continuance where additional discovery materials were tendered to him at trial as the brief recess it gave defendant to review the material was adequate and defendant did not show he was prejudice by not being give a longer recess. Cunningham v. State, 828 So. 2d 208, 2002 Miss. App. LEXIS 11 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in denying defendant's motion for a continuance where the prosecution on the day of trial produced 22 photographs that were similar to six other photographs that had already been presented to defendant and the prosecutor stipulated that it would not use the new photographs at trial. Gray v. State, 799 So. 2d 53, 2001 Miss. LEXIS 278 (Miss. 2001).

The granting of a continuance is largely within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of sound discretion. Gates v. State, 484 So. 2d 1002, 1986 Miss. LEXIS 2421 (Miss. 1986).

Although capital cases are required to be tried during the term in which the indictment is returned, unless good cause is shown to the contrary, the granting of a motion by the defendant for a continuance is a matter largely within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of discretion. King v. State, 251 Miss. 161, 168 So. 2d 637, 1964 Miss. LEXIS 337 (Miss. 1964).

Refusal to grant a continuance is not ground for reversal unless the court abused its discretion and injustice has resulted. Eslick v. State, 238 Miss. 666, 119 So. 2d 355, 1960 Miss. LEXIS 454 (Miss. 1960).

Granting of a continuance is a matter that lies within the discretion of a trial judge and refusal of continuance will not be grounds for reversal unless that discretion has been abused and the court is satisfied that injustice has resulted therefrom. Gallego v. State, 222 Miss. 719, 77 So. 2d 321, 1955 Miss. LEXIS 657 (Miss. 1955).

A motion to pass case for two or three days so that defendant might have time in which to prepare case for trial, did not meet the requirements of this section [Code 1942, § 1520]. Gatlin v. State, 219 Miss. 167, 68 So. 2d 291, 1953 Miss. LEXIS 378 (Miss. 1953).

A trial judge has a broad discretion in granting and refusing continuances. Whittington v. State, 215 Miss. 377, 60 So. 2d 813, 1952 Miss. LEXIS 576 (Miss. 1952); Williams v. State, 216 Miss. 158, 61 So. 2d 793, 1953 Miss. LEXIS 619 (Miss. 1953); Gatlin v. State, 219 Miss. 167, 68 So. 2d 291, 1953 Miss. LEXIS 378 (Miss. 1953); Hearn v. State, 219 Miss. 412, 69 So. 2d 223, 1954 Miss. LEXIS 348 (Miss. 1954); Bucklew v. State, 218 Miss. 820, 67 So. 2d 881, 1953 Miss. LEXIS 609 (Miss. 1953); Woodruff v. State, 220 Miss. 24, 70 So. 2d 58, 1954 Miss. LEXIS 402 (Miss. 1954); Gillespie v. State, 221 Miss. 116, 72 So. 2d 245, 1954 Miss. LEXIS 519 (Miss. 1954).

Where there was no formal motion for a continuance or postponement as required by this section [Code 1942, § 1520] the refusal of court to allow a delay on the ground of surprise was not an error. Douglas v. State, 212 Miss. 176, 54 So. 2d 254, 1951 Miss. LEXIS 439 (Miss. 1951).

A trial judge has broad discretion in granting and refusing continuances, and this section [Code 1942, § 1520] enjoins upon the supreme court the duty not to reverse a case because the trial court refuses a continuance unless the court is satisfied that injustice resulted therefrom. Parker v. State, 201 Miss. 579, 29 So. 2d 910, 1947 Miss. LEXIS 423 (Miss. 1947); Lewis v. State, 56 So. 2d 397 (Miss. 1952).

While procedure for invoking the discretion of the court in granting continuances is subject to the conformance with established rules, such rules are in turn subject to the circumstances of each case. Jackson

v. State, 199 Miss. 853, 25 So. 2d 483, 1946 Miss. LEXIS 253 (Miss. 1946), limited, Minneweather v. State, 55 So. 2d 160 (Miss. 1951).

While the granting or refusing of further time and continuances is largely discretionary with the trial judge, such discretion must be a sound judicial discretion having due regard to the rights of the public and of the defendant. Cruthirds v. State, 190 Miss. 892, 2 So. 2d 145, 1941 Miss. LEXIS 105 (Miss. 1941).

The trial judge has discretion in granting or overruling motion for continuance, and unless defendant is prejudiced by such ruling there will be no reversal. Cox v. State, 138 Miss. 370, 103 So. 129, 1925 Miss. LEXIS 52 (Miss. 1925); Ware v. State, 133 Miss. 837, 98 So. 229, 1923 Miss. LEXIS 186 (Miss. 1923).

The matter of granting a continuance is a matter of discretion of the court under all the facts. Williams v. State, 92 Miss. 70, 45 So. 146, 1907 Miss. LEXIS 8 (Miss. 1907); State v. Vollm, 96 Miss. 651, 51 So. 275 (Miss. 1910); Ellis v. State, 198 Miss. 804, 23 So. 2d 688, 1945 Miss. LEXIS 250 (Miss. 1945); Jackson v. State, 199 Miss. 853, 25 So. 2d 483, 1946 Miss. LEXIS 253 (Miss. 1946), limited, Minneweather v. State, 55 So. 2d 160 (Miss. 1951); Cody v. State, 24 So. 2d 745 (Miss. 1946); Bolin v. State, 209 Miss. 866, 48 So. 2d 581, 1950 Miss. LEXIS 452 (Miss. 1950).

A judgment will not be reversed because a continuance is refused, unless there was an abuse of sound discretion by the trial court. Solomon v. State, 71 Miss. 567, 14 So. 461, 1893 Miss. LEXIS 119 (Miss. 1893); Lipscomb v. State, 76 Miss. 223, 25 So. 158, 1898 Miss. LEXIS 130 (Miss. 1898).

2. —In particular circumstances.

A trial court abused its discretion by refusing to grant a criminal defendant's request for a continuance, even though there was no demonstrative affidavit of evidence and prejudice against him and no proof as required under this section, where his court-appointed attorney indicated that he was not prepared for trial, the nature of the charges brought about by the multi-count indictment were uncertain, there was an extremely short period of time between arraignment and trial, and the State failed to provide certain discovery prior to trial. Lambert v. State, 654 So. 2d 17, 1995 Miss. LEXIS 199 (Miss. 1995).

A trial court's denial of a defendant's 3 motions for continuance did not warrant reversal of his conviction where he failed to show that the denial of any of his motions for continuance was an abuse of discretion or that any injustice resulted, and in each instance where a problem arose, he in some way caused or contributed to the cause of the problem. Johnson v. State, 631 So. 2d 185, 1994 Miss. LEXIS 31 (Miss. 1994).

A circuit court abused its discretion when it refused to grant a continuance to the defendants in a prosecution for sale of cocaine where, approximately two months prior to trial, the court ordered the prosecution "to make diligent efforts to obtain the address of the confidential informant" who set up the sales giving rise to the prosecution, and it was apparent on the eve of trial that the prosecution had done nothing to locate the informant. Gowdy v. State, 592 So. 2d 29, 1991 Miss. LEXIS 841 (Miss. 1991).

No abuse of discretion by trial court was found in denial of motion for continuance where defendant alleged he needed more time to prepare his claim of violation of right to speedy trial. Hughey v. State, 512 So. 2d 4, 1987 Miss. LEXIS 2752 (Miss. 1987).

Trial judge did not abuse his discretion in denying defendants' motion for continuance to permit defense counsel to examine contents of, and to locate author of, 2 letters, purporting to exonerate defendant of armed robbery charge, which were allegedly written by the person whom defendant contended had actually perpetrated the robbery, where neither of the 2 persons indicted along with defendant admitted knowing the person named by defendant, and no attempt was made to introduce the letters into evidence. Ex parte Baxley, 496 So. 2d 688, 1986 Ala. LEXIS 3920 (Ala. 1986).

It is error to refuse continuance to rape defendant where appointed counsel for defendant is excused just prior to trial on basis of possible conflict of interest and newly appointed attorney informs judge of need for additional time to prepare; however refusal to grant continuance is not ground for setting aside conviction where defendant is not prejudiced by error in that every witness needed by defendant does in fact appear and testify, there is ample evidence on main issue in case, and defendant fails to show how continuance would have made difference in result. Plummer v. State, 472 So. 2d 358, 1985 Miss. LEXIS 2099 (Miss. 1985).

In a prosecution for grand larceny, the refusal of the trial judge to grant a continuance to the defense would not be disturbed where the appeal did not have it in a record of proceedings or evidence presented to the court showing alleged prejudice to the defendant in support of the motion for a continuance. Greene v. State, 406 So. 2d 805, 1981 Miss. LEXIS 2297 (Miss. 1981).

In a prosecution for incest, the trial court did not abuse its discretion in denying the defendant's motion for a continuance where one of the primary complaints in the motion had been that counsel had not had an opportunity to interview the prosecuting witness and, in ruling on the motion, the court had directed the district attorney to present the witness and the defense attorney had had an opportunity to interview the witness at length before the trial. Speagle v. State, 390 So. 2d 990, 1980 Miss. LEXIS 2163 (Miss. 1980), limited, Mitchell v. State, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989).

In a robbery prosecution presenting neither a complex fact situation nor complex legal problems, wherein the defendant admitted taking part in the robbery charged and the jury found against her on her defense of duress, and the record showed that she received a fair and impartial trial during which she was ably defended, the overruling of her motion for continuance was not an abuse of discretion, even though the trial was held 4 days after appointment of counsel. Brown v. State, 252 So. 2d 885, 1971 Miss. LEXIS 1205 (Miss. 1971).

Continuance is permissibly denied to one for whom court appointed counsel two days prior to trial, after he had been in jail for eight months, where it does not appear that any other witnesses would have been available if more time had been granted. Coggins v. State, 234 Miss. 369, 106 So. 2d 388, 1958 Miss. LEXIS 505 (Miss. 1958).

In a prosecution for murder where the accused was put on trial two weeks after the commission of the offense and at the same term of court which had been in session at the time of the commission of the offense, there was no error. Gallego v. State, 222 Miss. 719, 77 So. 2d 321, 1955 Miss. LEXIS 657 (Miss. 1955).

Where accused was arrested on July 11, 1954, for the crime of rape occurring on July 10, 1954, and indicted on July 12, 1954, and judgment was rendered on July 16, 1954, in the circuit court which was in regular July session, the record on appeal failed to establish any abuse of discretion by trial judge in overruling a motion for continuance on the ground that there was insufficient time to prepare a defense. Robinson v. State, 223 Miss. 70, 77 So. 2d 265, 1955 Miss. LEXIS 354 (Miss.), cert. denied, 350 U.S. 851, 76 S. Ct. 91, 100 L. Ed. 757, 1955 U.S. LEXIS 553 (U.S. 1955).

Where defendants were free on bail for three months in prosecution for assault and battery with intent to kill and murder of highway patrolmen, it was their duty to exercise reasonable diligence in obtaining legal counsel and court did not abuse discretion in denying an application for continuance. Bolin v. State, 209 Miss. 866, 48 So. 2d 581, 1950 Miss. LEXIS 452 (Miss. 1950).

Where a killing occurred on July 15, defendant was indicted on August 22, arraigned on August 23, and put to trial on August 29, the appellant's counsel having a week in which to prepare for the trial and it was not shown that any witnesses whom he may have desired were unavailable and he did not renew his motion for continuance on the day the trial began and did not, after conclusion of the trial make a motion for new trial, the trial judge did not abuse his discretion and no prejudicial error resulted from his overruling a motion for continuance. Newell v. State, 209 Miss. 653, 48 So. 2d 332, 1950 Miss. LEXIS 428 (Miss. 1950).

3. Requisites and sufficiency of application and affidavit.

Trial court's denial of a continuance was not reversible error, as the defendant offered no evidence as to additional witnesses who were unavailable to testify, as to what would have been added to the defense had additional time been granted, or as to what due diligence was used to procure absent witnesses or absent documents pursuant to Miss. Code Ann. § 99-15-29. Stubbs v. State, 845 So. 2d 656, 2003 Miss. LEXIS 115 (Miss. 2003).

Denial of defendant's motion for continuance to obtain presence of a witness, who was in federal custody in another state, on ground that motion was untimely was not an abuse of discretion; defendant only requested witness be present on Friday before trial, defendant relied solely on state to secure witness, process to secure such a prisoner generally required 30 to 90 days, and defendant failed to file an affidavit showing facts expected to be proven by absent witness, the name and address of witness, statement that affiant had used due diligence to obtain witness, and a statement that continuance was sought not for delay only. Medina v. State, 688 So. 2d 727, 1996 Miss. LEXIS 635 (Miss. 1996).

An application for a continuance based on the inability of a witness to testify due to illness should be governed by the procedure set forth in Code 1942 § 1520 when a continuance is sought because of the absence of a witness. Smith v. State, 278 So. 2d 454, 1973 Miss. LEXIS 1447 (Miss.), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474, 1973 U.S. LEXIS 1624 (U.S. 1973).

A motion for continuance which did not comply with the requirements of this section [Code 1942, § 1520] was properly overruled. Lewis v. State, 56 So. 2d 397 (Miss. 1952).

If defendant's request for continuance because of absence of witness is refused, defendant in criminal case must sue out proper process for witness and when case is called for trial must again apply for continuance, making such changes in affidavit as conditions then existing require; if still refused, he must persist in using process of court to compel attendance of witness on trial; and if convicted, on hearing of motion for new trial, and if appearance of witness cannot be had, his ex parte affidavit must be presented to court, if it can be obtained, on hearing of motion for new trial. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

To be entitled to continuance because of absence of witness, defendant must promptly have witness summoned, must ask for attachment if witness has been summoned and failed to appear, must apply for continuance before venire drawn, must set out in affidavit name and residence of absent witness and facts expected to be shown by him and what steps have been taken to secure his attendance, must negative idea that witness is absent with defendant's consent or procurement, and must give cause of witness' absence, if known. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

Defendant in criminal prosecution cannot complain of any error of court in refusing to grant continuance on ground that certain witnesses were absent when he does not comply with rule governing continuances and follow this up on motion for new trial with affidavits as to what witnesses would swear to, or give reasonable explanation of why affidavits are not procured. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

Formal application for continuance to secure testimony of absent witnesses must be followed by appearance of witnesses in court or production of their affidavits or showing as to why affidavits could not be had. Hinton v. State, 175 Miss. 308, 166 So. 762, 1936 Miss. LEXIS 41 (Miss. 1936).

Application for a continuance must set forth the substance of the testimony of the absent witness. This application on a motion for a new trial should be produced and made a part of the record. Ware v. State, 133 Miss. 837, 98 So. 229, 1923 Miss. LEXIS 186 (Miss. 1923).

In deciding upon an application the court is not confined to a consideration of the matters stated in the affidavit but may inquire into the truth of the statements either by hearing other evidence or applying its own knowledge of what has occurred in the case up to the time. Strauss v. State, 58 Miss. 53, 1880 Miss. LEXIS 92 (Miss. 1880).

4. —Properly granted.

It is not reversible error to grant a continuance to the state despite the fact that the state failed to furnish the affidavit called for in 1972 Code § 99-15-29. Wells v. State, 288 So. 2d 860, 1974 Miss. LEXIS 1877 (Miss. 1974).

5. —Properly denied.

Circuit court properly denied defendant's motion for a continuance because she failed to explain how her counsel was unprepared or to provide evidence from the record of such a lack of preparedness, failed to offer the witnesses' names or to explain what information the witnesses would provide that would be crucial to the defense, and the delayed request for certain documents and the resultant time crunch were defense counsel's own creation Jackson v. State, 231 So. 3d 257, 2017 Miss. App. LEXIS 678 (Miss. Ct. App. 2017).

Denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on that ground; because defendant failed to assert in his motion for a new trial that the trial court had erred in failing to grant his motion for a continuance, the issue did not need to be reviewed on appeal. Conner v. State, 875 So. 2d 253, 2004 Miss. App. LEXIS 403 (Miss. Ct. App. 2004).

In a murder case where defendant alleged that he was not well represented by his public defense counsel and needed additional time to hire private counsel, the trial court did not abuse its discretion in denying defendant's motion for continuance because there was no prejudice to defendant in proceeding to trial with his two court-appointed attorneys, and defendant was given ample time in which to find alternative counsel prior to trial. Rinehart v. State, 2003 Miss. LEXIS 558 (Miss. Oct. 23, 2003), op. withdrawn, sub. op., 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Trial court's denial of a continuance was not reversible error, as the defendant offered no evidence as to additional witnesses who were unavailable to testify, as to what would have been added to the defense had additional time been granted, or as to what due diligence was used to procure absent witnesses or absent documents pursuant to Miss. Code Ann. § 99-15-29. Stubbs v. State, 845 So. 2d 656, 2003 Miss. LEXIS 115 (Miss. 2003).

A judge did not abuse his discretion by denying a defendant's request for a continuance where the defendant failed to comply with the procedural guidelines set forth in this section in the presentation of his request for a continuance. Edwards v. State, 594 So. 2d 587, 1992 Miss. LEXIS 47 (Miss. 1992).

A trial court did not abuse its discretion in denying a defendant's motion for a continuance even though the court had permitted the defendant to substitute counsel 3 days prior to trial where the substitution was permitted upon the representation of the substituted attorney that he would be ready for trial on the designated date. Watson v. State, 521 So. 2d 1290, 1988 Miss. LEXIS 105 (Miss. 1988).

A defendant waived his right to object to a discovery violation by his failure to request a continuance when the evidence in question was introduced, even though the trial court had previously stated that no more continuances would be granted to either side. Counsel must make a record regardless of the trial court's apparent unwillingness to rule in counsel's favor. Cole v. State, 525 So. 2d 365, 1987 Miss. LEXIS 2655 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348, 1988 U.S. LEXIS 4775 (U.S. 1988).

In a prosecution for burglary, armed robbery, and kidnapping, the trial court did not err in denying a continuance requested by the defense where the only information received by the court by affidavit or otherwise was that a missing witness knew where the defendant had been on the day of the alleged crimes and where there was no showing as to whether or not the missing witness would ever be available to testify. Woods v. State, 393 So. 2d 1319, 1981 Miss. LEXIS 1904 (Miss. 1981).

In a prosecution for capital murder, the trial court did not err in denying defendant's motion for a continuance in order to locate two subpoenaed witnesses, where defendant failed to meet the requirements of this section in that his motion was not supported by an affidavit and did not state with particularity the material testimony expected from the absent witnesses, and where the testimony of the witnesses who eventually did appear at the hearing on a motion for a new trial did not add a new dimension to defendant's case. Culberson v. State, 379 So. 2d 499, 1979 Miss. LEXIS 2528 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250, 1980 U.S. LEXIS 3943 (U.S. 1980).

In a prosecution for the embezzlement of a rented car, the trial court properly denied defendant's motion for a continuance where there was no compliance with this section and where, in any event, the motion was untimely. Collins v. State, 369 So. 2d 500, 1979 Miss. LEXIS 2262 (Miss. 1979).

Defendant's ore tenus motion, made during trial and requesting a recess until a witness (for whom no subpoena or process had been issued or requested) could be brought to testify, was properly denied since it did not conform to the requirements of this statute, being unsworn, without attached affidavit, and failing to state that due diligence had been used to procure the witness or that the continuance was sought to do justice and not for delay only. McClendon v. State, 335 So. 2d 887, 1976 Miss. LEXIS 1944 (Miss. 1976).

Defendant's motion for a continuance on account of the absence of a witness was properly denied where no subpoena for this witness was requested or issued until the day preceding the trial, it was conceded that the witness was not in the state, no showing was made in connection with the motion as to what the testimony of the absent witness would be or that his testimony was relevant or material, and, on appellant's motion for a new trial, neither the witness nor his affidavit was produced and there was no proof of any kind to show that his testimony would be relevant or material. Dyer v. State, 300 So. 2d 788, 1974 Miss. LEXIS 1637 (Miss. 1974).

Where the motion of a defendant accused of murder for a continuance of the case for the term did not comply with the requirements of this section [Code 1942, § 1520], the trial court did not commit reversible error in the denial thereof. Dean v. State, 234 Miss. 376, 106 So. 2d 501, 1958 Miss. LEXIS 506 (Miss. 1958).

Denial of an application for continuance on the ground of absence of three witnesses was not error where one of the witnesses appeared and testified on behalf of the defendant, another witness was in military service beyond jurisdiction of the court, there was no showing that the third witness could have been brought in by exercise of reasonable diligence, and the application for continuance did not set forth their testimony. Bynum v. State, 222 Miss. 632, 76 So. 2d 821, 1955 Miss. LEXIS 648 (Miss. 1955).

Where defendant moved for a continuance because of an absence of alleged material witness and defendant did not know where the witness might be found or as to what he would testify and the motion failed to comply with the rules, the continuance was properly denied. Shoemaker v. State, 222 Miss. 257, 75 So. 2d 647, 1954 Miss. LEXIS 643 (Miss. 1954).

Where in requesting the continuance, the defendant did not set forth in his affidavit the facts which he expected to prove by the absent witnesses, if such witnesses could be found, or the names or places of residence of the absent witnesses and no showing was made that there was any reasonable probability that such witnesses could be obtained at a later date, the defendant's request would be denied. Woodruff v. State, 220 Miss. 24, 70 So. 2d 58, 1954 Miss. LEXIS 402 (Miss. 1954).

In prosecution for unlawful possession of intoxicating liquors where defendant failed to file motion for continuance in a proper written form as prescribed by this section [Code 1942, § 1520], this was sufficient justification for the circuit court to refuse to grant the requested continuance. Smith v. State, 219 Miss. 741, 69 So. 2d 837, 1954 Miss. LEXIS 381 (Miss. 1954).

Refusal to grant motion for continuance because of absence of material witness was held justified where due diligence was not shown and no effort on part of the defendant to procure the presence of the witness was made until the trial was practically in progress and the motion for a new trial was not followed up by the affidavit of the absent witness. Thigpen v.

State, 206 Miss. 87, 39 So. 2d 768, 1949 Miss. LEXIS 244 (Miss. 1949).

A motion for a continuance because of the absence of a material witness is correctly denied when the absent witness was not in the jurisdiction of the court, had not been summoned, and his affidavit had not been obtained. Rodgers v. State, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948).

Motion for continuance because of absence of a witness was properly overruled where her evidence would have been merely cumulative, it was not shown that she could be produced at a subsequent trial, and, on motion for a new trial, neither her affidavit showing what her testimony would be was produced nor was there any showing that production of such affidavit was impracticable. Magee v. State, 200 Miss. 861, 27 So. 2d 767, 1946 Miss. LEXIS 347 (Miss. 1946).

Refusal to grant continuance to secure testimony of absent witnesses held not error, where no sworn application was presented to court and continued diligence was not shown and neither absent witnesses nor their affidavits were presented on motion for a new trial. Hinton v. State, 175 Miss. 308, 166 So. 762, 1936 Miss. LEXIS 41 (Miss. 1936).

An affidavit for continuance on the ground of the absence of a witness, which was in its nature an application for delay to give defendant an opportunity to make search for evidence not known to exist, was insufficient, and a denial of the application for continuance was proper. Richberger v. State, 90 Miss. 806, 44 So. 772, 1907 Miss. LEXIS 122 (Miss. 1907).

6. Cross-examination of affiant.

Where an accused sought a continuance on the alleged ground that he could not obtain his witnesses, but failed to comply with the requirements of Code 1942, § 1520 with reference to filing the proper affidavit, the motion was properly overruled. Saucier v. State, 259 So. 2d 484, 1972 Miss. LEXIS 1531 (Miss. 1972).

Law relating to cross-examination on application for continuance is not applicable to criminal cases. Hill v. State, 152 Miss. 708, 120 So. 817, 1929 Miss. LEXIS 242 (Miss. 1929).

Permitting district attorney to examine defendant over objection on application for continuance was erroneous; defendant, applying for continuance, has right to stand on application. Hill v. State, 152 Miss. 708, 120 So. 817, 1929 Miss. LEXIS 242 (Miss. 1929).

Cross-examination of defendant on motion for continuance held, under circumstances, harmless error. Hill v. State, 152 Miss. 708, 120 So. 817, 1929 Miss. LEXIS 242 (Miss. 1929).

7. Time for application.

Where the state relies upon a sale made at a different time from that made in the indictment to the surprise of the defendant, a continuance should be asked before verdict if desired. Peebles v. State, 105 Miss. 834, 63 So. 271, 1913 Miss. LEXIS 266 (Miss. 1913).

8. Grounds for continuance, generally.

In a murder case, defendant's motion for a continuance on the first day of trial to obtain new counsel was properly denied because defendant's Sixth Amendment right to counsel of his choice was not absolute, the denial of the motion did not result in manifest injustice, and the proposed disqualification of a prosecutor had no bearing on this issue. Ousley v. State, 984 So. 2d 996, 2007 Miss. App. LEXIS 462 (Miss. Ct. App. 2007), aff'd, 984 So. 2d 985, 2008 Miss. LEXIS 338 (Miss. 2008).

Where defendant had notice of a trial date that had been set for quite some time, a trial court did not err by denying defendant's motion for a continuance when he sought to fire his attorney on the morning of trial. McCollins v. State, 952 So. 2d 305, 2007 Miss. App. LEXIS 167 (Miss. Ct. App. 2007).

There was no merit in defendant's claim that his defense counsel's performance was deficient due to his failure to request a continuance after the trial court denied his request for a change of venue, as defendant had failed to allege that any publicity additional to the four newspaper articles submitted during the change of venue hearing had occurred accordingly, there was no cause shown for seeking a continuance. Grayson v. State, 879 So. 2d

1008, 2004 Miss. LEXIS 721 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593 (U.S. 2005).

Trial judge did not abuse his discretion in refusing to grant a continuance where defendant did not follow the proper procedure for obtaining a continuance and it came to light that the witness was unavailable and would not be available to testify at any time in the foreseeable future. McGee v. State, 828 So. 2d 847, 2002 Miss. App. LEXIS 551 (Miss. Ct. App. 2002).

Trial court did not err in failing to continue the trial in the absence of a physician, a defense witness, because there was no indication that defendant acted with due diligence to obtain the presence of the physician at trial, nor was there any evidence that the physician's testimony was material. Evans v. State, 844 So. 2d 470, 2002 Miss. App. LEXIS 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 483 (Miss. Ct. App. 2003).

Trial court erred in denying motion for continuance where district attorney first provided discovery only one day before date of trial, rejected was contention of district attorney that denial of continuance was warranted on grounds that defendant had failed to bring his discovery motion up for hearing on court's motion day and that there was no prejudice involved. Stewart v. State, 512 So. 2d 889, 1987 Miss. LEXIS 2750 (Miss. 1987).

An application for a continuance based on the inability of a witness to testify due to illness should be governed by the procedure set forth in Code 1942 § 1520, when a continuance is sought because of the absence of a witness. Smith v. State, 278 So. 2d 454, 1973 Miss. LEXIS 1447 (Miss.), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474, 1973 U.S. LEXIS 1624 (U.S. 1973).

The application for continuance on the ground that the attorney for defendant has not had a reasonable time to prepare for trial is different from an application for continuance on the ground that there is an absent witness, for when a witness is absent the movant must continue his effort to obtain the witness after filing the motion required by this section [Code 1942, § 1520], but a motion for continuance upon the ground of insufficient time to prepare for trial is subject to proof and also to facts as they may appear from that which is known to the trial court. Barnes v. State, 249 So. 2d 383, 1971 Miss. LEXIS 1160 (Miss. 1971).

A motion for a change of venue, rather than a motion for continuance, is the usual procedure where an accused fears that he will be unable to get an impartial jury because of prejudicial pretrial publicity. Wilson v. J. Ed Turner, Inc., 221 So. 2d 368, 1969 Miss. LEXIS 1497 (Miss. 1969).

No abuse of discretion is involved in denying a continuance sought on the ground that the state had been permitted to amend an indictment for burglary with respect to the ownership of the property. Kelly v. State, 239 Miss. 683, 124 So. 2d 840, 1960 Miss. LEXIS 341 (Miss. 1960).

Application for a continuance to the next term was properly denied where the crime was committed in July, the indictment was had in October, the accused employed two attorneys the day the indictment was returned, all of the testimony involved one place and one occasion, all witnesses were available both to the state and to the accused and apparently all testified, and the court set the case for trial a week after hearing the motion. Garner v. State, 202 Miss. 21, 30 So. 2d 413, 1947 Miss. LEXIS 235 (Miss. 1947).

After procuring continuance on affidavit by defendant setting out the testimony of absent witnesses, such witnesses may be cross-examined on such affidavit as to what defendant expected to prove by them. McLeod v. State, 130 Miss. 83, 92 So. 828, 1922 Miss. LEXIS 199 (Miss. 1922).

On an application for continuance on the ground of the absence of a witness where it is agreed witness if present would state certain facts on the trial, it is error to permit opposing party to prove that such witness was present at a former trial and did not testify. Smith v. State, 90 Miss. 111, 43 So. 465, 1907 Miss. LEXIS 61 (Miss. 1907), overruled, Wells v. State, 96 Miss. 500, 51 So. 209, 1910 Miss. LEXIS 162 (Miss. 1910).

The fact that an absent witness is within the jurisdiction of the court is material in an application for a continuance. Donald v. State, 41 So. 4 (Miss. 1906).

9. —Time to prepare for trial; properly granted.

Pursuant to Miss. Code Ann. § 99-15-29, the trial court did not abuse his discretion by granting defendant a mere one-day continuance; while defendant's attorney alleged that he needed additional time to research Mississippi's felony-murder statute, he offered no explanation as to why he could not have done so during the five weeks that he was on notice that his client would be tried for felony murder. Coleman v. State, 30 So. 3d 387, 2010 Miss. App. LEXIS 109 (Miss. Ct. App. 2010).

A trial court erred in failing to grant a defendant's motion for a continuance to allow additional time to prepare for trial where the defendant's attorney was retained only 8 days before trial, and the attorney was a sole practitioner who had to prepare pleadings and motions, do research, attend court, and interview witnesses in addition to running his law practice, so that the defendant was, in effect, being penalized for hiring a sole practitioner to represent her. Hughes v. State, 589 So. 2d 112, 1991 Miss. LEXIS 765 (Miss. 1991).

It is error to refuse continuance to rape defendant where appointed counsel for defendant is excused just prior to trial on basis of possible conflict of interest and newly appointed attorney informs judge of need for additional time to prepare; however refusal to grant continuance is not ground for setting aside conviction where defendant is not prejudiced by error in that every witness needed by defendant does in fact appear and testify, there is ample evidence on main issue in case, and defendant fails to show how continuance would have made difference in result. Plummer v. State, 472 So. 2d 358, 1985 Miss. LEXIS 2099 (Miss. 1985).

In a close case between murder and manslaughter, an injustice resulted when the court denied two motions for continuance and forced the defendant to go to trial 7 days after he was indicted for murder and just 15 days after the altercation which resulted in the death of the victim and the serious cutting of the defendant. Cochran v. State, 244 So. 2d 22, 1971 Miss. LEXIS 1321 (Miss. 1971).

Defendant and his counsel should have been given more than a week to prepare for a murder trial, particularly where two motions for continuance were presented to the court: one listing pre-set required court appearances by defense counsel in other matters during the week before trial, and the other setting forth the absence of witnesses, two of them alleged to be eyewitnesses, and where both motions ended with a sworn statement that defendant and his counsel required more time to properly investigate and prepare for trial, and that the motion was made, not for delay, but that justice might be served. Cochran v. State, 244 So. 2d 22, 1971 Miss. LEXIS 1321 (Miss. 1971).

10. — —Properly denied.

Issue of whether the trial court erred by denying defendant a continuance was procedurally barred because the record did not indicate that defendant ever filed a motion for new trial. In any event, defendant failed to establish that the trial court abused its discretion in denying defendant's motion for a continuance because (1) defense counsel stated that counsel was not prepared because counsel had been busy with other cases, even though counsel had four months to prepare for the trial; (2) the trial court recessed the proceeding so that defense counsel could listen to a tape of defendant's statement, which was approximately fifteen minutes in length, and compare it to the previously provided transcript; and (3) counsel was given an opportunity to cross-examine a sheriff's deputy chief regarding the content of the tape and the accompanying transcript. Moore v. State, 52 So. 3d 339, 2010 Miss. LEXIS 574 (Miss. 2010).

There was no merit to defendant's contention that the trial judge erred in denying a motion for a continuance because defendant had sufficient notice that the case had been set for trial where defendant was represented by two attorneys, one of whom made an entry of appearance more than three years before the trial date. Jones v. State, 20 So. 3d 57, 2009 Miss. App. LEXIS 694 (Miss. Ct. App. 2009).

Trial court did not err in denying defendant's motion for a continuance in order to have an expert examine the audiotape of defendant's statement to the police because defendant and defense counsel had possession of the tape well in advance of trial. Dahl v. State, 989 So. 2d 910, 2007 Miss. App. LEXIS 822 (Miss. Ct. App. 2007), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 412 (Miss. 2008).

Motion for a continuance was properly denied in a grand larceny case because defendant knew of the charges against him for several months and had ample time to hire a private attorney; hiring an attorney at the last minute was not an adequate reason for a continuance. Easterling v. State, 963 So. 2d 49, 2007 Miss. App. LEXIS 528 (Miss. Ct. App. 2007).

Prosecution disclosed the identity and last known residence of the informant well before the scheduled trial, and the trial court gave defendant the opportunity to accept a continuance, but he was satisfied to go to trial without the informant or police chief present; there was no abuse of the trial court's discretion when it denied the continuance on the day of trial. Hudderson v. State, 941 So. 2d 221, 2006 Miss. App. LEXIS 803 (Miss. Ct. App. 2006).

In a case where defendant's attorney claimed that he was not given adequate time to review the discovery materials, prepare for trial, and consult with an independent medical expert, a trial judge denied his motion for a continuance because defendant's attorney was hired in January and attended defendant's habeas corpus hearing in March; also, his attorney stated that he had worked on the case every day since he received the State's discovery materials. Furthermore, on the day of the trial, the trial court asked defendant's attorney whether he was ready for trial, and the attorney announced that he was ready; thus, the trial court did not abuse its discretion in denying the motion for a continuance. McFadden v. State, 929 So. 2d 365, 2006 Miss. App. LEXIS 105 (Miss. Ct. App. 2006).

Trial court did not abuse its discretion in denying defendant's motion for a continuance on the ground that defendant's attorney had been denied access to defendant on the day before trial, which was a Sunday, because defendant and his attorney had ample time to confer prior to trial. Further, the trial judge stated on the record that he had been available had defense counsel tried to contact him on Sunday. Peters v. State, 920 So. 2d 1050, 2006 Miss. App. LEXIS 104 (Miss. Ct. App. 2006).

Defendant failed to show error in the trial court's denial of his motion for a continuance, there was no showing that defense counsel would have done anything differently had the trial court granted a motion for continuance before the start of trial. Stack v. State, 860 So. 2d 687, 2003 Miss. LEXIS 529 (Miss. 2003).

Defendant failed to sustain his burden of showing that the trial court abused its discretion in denying defendant's motion to continue his trial for statutory rape where the record on appeal was silent as the reasons for the requested continuance or why additional time was needed for trial Farrish v. State, 840 So. 2d 820, 2003 Miss. App. LEXIS 232 (Miss. Ct. App. 2003).

Defendant's request for a continuance so that he could be granted a competency hearing was properly denied, because defendant did not display behavior that would even remotely lead someone to believe that he was incompetent to stand trial. Reeves v. State, 825 So. 2d 77, 2002 Miss. App. LEXIS 475 (Miss. Ct. App. 2002).

Motion for continuance made by replacement counsel because he was retained eight days before trial was properly denied since defendant had failed to preserve the issue for appeal and did not show how he was prejudiced by the denial as he was found not to be guilty of additional crimes for which he was tried. Jones v. State, 801 So. 2d 751, 2001 Miss. App. LEXIS 520 (Miss. Ct. App. 2001).

Where there was no discovery violation by the state and the defendant failed to present his counsel with a witness list, he was not entitled to a continuance so as to allow further preparation of his defense. Fikes v. State, 749 So. 2d 1107, 1999 Miss. App. LEXIS 544 (Miss. Ct. App. 1999).

The trial court did not abuse its discretion in denying a continuance in a manslaughter prosecution to allow the defendant more time to test the victim's blood for LSD and PCP; the day before a witness expressed surprise that his blood had turned up negative for drugs because the witness believed he was using acid where (1) the defendant had previously taken a tape-recorded conversation with the same witness in which the witness claimed she knew nothing of the defendant using drugs, and (2) the record showed that, other than alcohol, the victim's blood tested negative for six commonly abused drugs. Swindle v. State, 755 So. 2d 1158, 1999 Miss. App. LEXIS 318 (Miss. Ct. App. 1999).

There was no manifest injustice resulting from the denial of a continuance, notwithstanding the contention that defense counsel was informed the day before trial that the case would not be tried the next day, that believing the case to be continued, the defendant's counsel had him appear at the courthouse merely to sign an order of continuance, that upon arriving at the courthouse, the defendant was informed that he would go to trial that day, and that, consequently, the defendant argued that he did not have his witnesses appear in court; the defendant was aware of the date of trial for two and a half months, his trial was designated as "first out" two weeks before trial, he was told the day before trial that his case may be preempted by another case but it was not a certainty, and he did not proffer at trial nor on appeal any additional witnesses nor did he attempt to delineate their testimony. Easley v. State, 744 So. 2d 822, 1999 Miss. App. LEXIS 262 (Miss. Ct. App. 1999).

The trial court did not abuse its discretion in refusing to grant a continuance where the record demonstrated that the defendant retained his own counsel who represented him at trial and had adequate time to secure and hire additional counsel, and where he failed to show that his trial counsel was not fully prepared for trial. White v. State, 746 So. 2d 953, 1999 Miss. App. LEXIS 183 (Miss. Ct. App. 1999).

A motion for a continuance was properly denied, notwithstanding the contention that defense counsel needed more time to locate and interview witnesses, where defense counsel never proffered any evidence naming the witnesses or setting forth the nature of their testimony. Hayes v. State, 723 So. 2d 1182, 1998 Miss. App. LEXIS 971 (Miss. Ct. App. 1998).

A defendant was not entitled to a continuance on the ground that he did not receive discovery material in sufficient time to make use of it where he did not request the material until 3 weeks before trial, he received the requested information 5 days before trial, and he failed to request a continuance until the day before trial. May v. State, 569 So. 2d 1188, 1990 Miss. LEXIS 672 (Miss. 1990).

When an accused appears on the morning of trial with a new lawyer and requests a continuance, the trial court does not abuse its discretion in denying the continuance. Byrd v. State, 522 So. 2d 756, 1988 Miss. LEXIS 70 (Miss. 1988).

A trial court did not abuse its discretion in denying a defendant's motion for a continuance where the newly appointed defense attorney had 24 days to prepare for trial. Fisher v. State, 532 So. 2d 992, 1988 Miss. LEXIS 438 (Miss. 1988).

A defendant was not entitled to discharge his court-appointed counsel and substitute a retained attorney as counsel on the day of the trial where the case had "dragged on" for a long period of time, had been set for trial on a date certain, and would be delayed by the appearance of the retained counsel, who had requested a continuance. Harrison v. State, 520 So. 2d 1352, 1987 Miss. LEXIS 2928 (Miss. 1987).

Trial court may deny capital murder defendant's request for continuance due to unavailability of defense fingerprint expert where court concludes that fingerprint expert would testify that fingerprints of murder victim and no one else had been found at scene of crime. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

In a prosecution for capital murder the trial court properly denied a motion for a continuance, where no proof was offered in support of the motion. Oates v. State, 421 So. 2d 1025, 1982 Miss. LEXIS 2267 (Miss. 1982).

In a prosecution for aggravated assault, the trial court did not err in denying defendant's motion for a continuance, even though defendant contended that the case was complex and that his attorney was involved in several other cases and did not have enough time to prepare, where defendant's privately employed attorney had eight days to prepare for trial, where he was an experienced attorney and former district attorney who vigorously represented defendant at trial, and where the record did not show prejudice by the refusal to grant a continuance or that his attorney's case load had precluded proper representation of defendant. Shaw v. State, 378 So. 2d 631, 1979 Miss. LEXIS 2539 (Miss. 1979).

Where an indictment originally charged the theft of a number of articles of personal property, and at the trial the district attorney asked leave to amend the indictment by eliminating all but four of the articles listed, and the accused claimed surprise and asked for a continuance on the ground that he had prepared to meet the indictment and had a witness who would testify that some of the articles eliminated by the amendment were not in fact stolen, the amendment was properly permitted and the motion for continuance was properly denied. Stevens v. State, 232 So. 2d 730, 1970 Miss. LEXIS 1641 (Miss. 1970).

The circuit court did not err in refusing to grant an accused a continuance on the ground that his attorney had not had adequate opportunity to prepare, where the accused had expressly asked the court for a speedy trial whereupon the case was set within 6 weeks, but on the call date the attorney for the accused advised the court that he did not represent the accused, whereupon the court appointed him to defend the accused and set the case up a week, and where, further, at the trial the accused was ably represented in a defense which was obviously well prepared. Wilson v. J. Ed Turner, Inc., 221 So. 2d 368, 1969 Miss. LEXIS 1497 (Miss. 1969).

In prosecution for felonious assault by cutting with knife, overruling motion for continuance on trial date is not abuse of court's discretion when indictment was returned on February 25, 1949, defendant was arraigned on February 28th, cause set for trial on March 2, defendant plead not guilty to indictment and stated he could procure services of attorney and court passed case to March 10th, attorneys were employed March 9th, and court passed case to March 11, 1949 when trial was held, and defendant was ably represented. Ferrell v. State, 208 Miss. 539, 45 So. 2d 127, 1950 Miss. LEXIS 272 (Miss. 1950).

Refusal to grant continuance on third trial of prosecution for rape, which trial took place some two weeks after employment of new counsel for defendant, did not constitute a denial of defendant's right to effective representation by counsel contrary to the Fourteenth Amendment of the United States Constitution, where more than two years had elapsed since the commission of the offense, such counsel had advantage of voluminous and comprehensive briefs, records and opinions of the court in two previous trials and the assistance of two investigators to help them in preparing for the trial. McGee v. State, 40 So. 2d 160 (Miss.), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487, 1949 U.S. LEXIS 1886 (U.S. 1949).

11. —Absence of witness; properly granted.

Trial court did not abuse its discretion by denying defense counsel's request to continue the trial due to the absence of a witness because the witness was not properly served with a subpoena, the defense was not diligent in its efforts to locate the witness, the witness' name was stricken from the witness list, and the substance of the witness' report was covered in another witness' testimony. Metcalf v. State, 265 So. 3d 1242, 2019 Miss. App. LEXIS 66 (Miss. Ct. App.), cert. dismissed, 265 So. 3d 181, 2019 Miss. LEXIS 117 (Miss. 2019).

Trial court did not err by denying defendant's motion for a continuance because, even though defendant asserted that it was clear that his only witness was subpoenaed to testify in the 2014 case, not the 2016 case that was being called for trial that day, defendant failed to identify any other witness that he would have called or any other evidence that he would have presented if a continuance had been granted. Harvell v. State, 281 So. 3d 1024, 2019 Miss. App. LEXIS 192 (Miss. Ct. App. 2019).

There was no indication that the trial judge abused his discretion, nor that manifest injustice occurred when the trial judge granted the State's request for a recess over the weekend because (1) neither the State nor the defense's subpoenas of the witnesses had been served; and (2) allowing the State to begin presenting evidence on Monday would allow it to present its case continuously and was done in an effort to reduce confusion to the jury. Forkner v. State, 902 So. 2d 615, 2004 Miss. App. LEXIS 1105 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 345 (Miss. 2005).

No manifest injustice resulted from the denial of defendant's motion for continuance as defendant did not present any evidence that he was unable to call an allegedly exculpatory witness during his three-week trial. Cox v. State, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Failure of counsel to issue subpoenas even for friendly, favorable witnesses is perilous, because if for some reason witness fails to appear, prerequisite for continuance is that he or she is either under process or reasonable effort has been made to serve him or her with subpoena. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

In order to be entitled to continuance because of absent witness, counsel must demonstrate to court that he or she "has used due diligence" to secure witness' presence; embraced therein is requirement that counsel has made timely effort to place absent witness under subpoena. Triplett v. State, 666 So. 2d 1356, 1995 Miss. LEXIS 597 (Miss. 1995).

Defendant is entitled to continuance to compel presence of doctor who has evaluated mental capacity of defendant where failure to grant continuance will result in lack of expert testimony as to defendant's mental capacity, which is major issue in case. Carter v. State, 473 So. 2d 471, 1985 Miss. LEXIS 2173 (Miss. 1985).

Where, in a grand larceny prosecution, motion for continuance was seasonably made and contained sworn averments that defendant, charged with the theft of sheep, purchased them from a witness who was the only witness to the transaction, that such witness was on board ship at sea as a member of the merchant marine and was unavailable as a witness, that process for him had been requested but he could not be reached or communicated with, that defendant had used due diligence to reach him and that he would be available at the next term of court, trial court abused its discretion in denying a continuance. Jackson v. State, 199 Miss. 853, 25 So. 2d 483, 1946 Miss. LEXIS 253 (Miss. 1946), limited, Minneweather v. State, 55 So. 2d 160 (Miss. 1951).

Where defendant was arrested for unlawful possession of whiskey in the county, immediately arraigned without the presence of his attorney, and trial was set for 8:30 A.M. the next day, and his attorney, who arrived just five minutes before trial time, having been previously engaged in chancery court in another county, requested time to confer with the defendant and prepare his defense, refusal of such request, trial and conviction of defendant were erroneous as denying defendant a fair and impartial trial, notwithstanding that defendant's principal witness was out of the state in view of statement in affidavit in support of such request that he would voluntarily appear and testify if given an opportunity to do so. Cruthirds v. State, 190 Miss. 892, 2 So. 2d 145, 1941 Miss. LEXIS 105 (Miss. 1941).

Where subpoena for wife of defendant as a witness in murder case was issued but falsely returned as having been personally served, and, upon discovery, a second subpoena was issued which disclosed that the witness could not be found in the county designated therein but there was information that she could be found in another county, defendant's application for continuance, showing that the witness was a material witness, should have been granted. Brooks v. State, 108 Miss. 571, 67 So. 53, 1914 Miss. LEXIS 240 (Miss. 1914).

Where, in a criminal case, defendant's affidavit, made on application for continuance on the ground of the absence of a witness, showed that the absent witness was a resident of the county, that she was away without defendant's procurement, that her absence was temporary, and that her testimony would prove defendant's innocence, and there was nothing to suggest that the application was not made in good faith, the trial court should have granted a continuance, notwithstanding that the witness was outside the jurisdiction of the court, in view of the short time between the indictment and the trial and the fact that persons charged with crime should have a reasonable time in which to procure witnesses. Cade v. State, 96 Miss. 434, 50 So. 554, 1910 Miss. LEXIS 146 (Miss. 1910).

Where murder case was set for trial only eight days after indictment and preparation for defense was promptly begun and process issued for defendant's witnesses, and it appeared that one witness lived in another county and could not be found, but was willing to and could appear at the next term of court, application for continuance should have been granted. Woodward v. State, 89 Miss. 348, 42 So. 167, 1906 Miss. LEXIS 11 (Miss. 1906).

It is a dangerous exercise of judicial discretion to refuse a continuance and a postponement of the trial to a future day of the term, where the affidavit alleges material facts, where all diligence has been shown and where it is averred that the same proof can be made by no other than the absent witness. Long v. State, 52 Miss. 23, 1876 Miss. LEXIS 160 (Miss. 1876).

12. — —Properly denied.

Trial court did not err in failing to grant a continuance despite the fact that a defense witness had disappeared because even if the witness would have testified, the testimony would have been duplicative of defendant's testimony and thus, defendant was not prejudiced by the denial of his request for a continuance. Watson v. State, 991 So. 2d 662, 2008 Miss. App. LEXIS 593 (Miss. Ct. App. 2008).

Continuance was not warranted in a capital murder case because defense counsel was aware of one witness before trial and failed to issue a subpoena, and as to a second witness, defendant's rights under the Sixth Amendment and Miss. Const. Art. 3, § 26 were not violated since there was no colorable need for the presence of the witness; moreover, defendant did not show that it was impossible or impracticable to secure an affidavit from the witness. King v. State, 962 So. 2d 124, 2007 Miss. App. LEXIS 494 (Miss. Ct. App. 2007).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in failing to grant defendant's motion for a continuance since the record contained no affidavits or any other indication that anyone knew a probationer's whereabouts, and there was no indication that the probationer would likely have been available at some time in the future. Jackson v. State, 962 So. 2d 649, 2007 Miss. App. LEXIS 104 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Trial court did not err in denying defendant's motion for a continuance based on a newly discovered witness; also, the trial court did not err in denying the motion for a continuance to permit the testimony of another officer about whether the cocaine came from defendant or another individual because, after proffering the information that the unavailable officer would have been able to provide, defendant's attorney did not show how the potential information could have been relevant to defendant's trial. Harris v. State, 921 So. 2d 366, 2005 Miss. App. LEXIS 423 (Miss. Ct. App. 2005), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 155 (Miss. 2006).

Where defendants did not name witnesses or state what facts were peculiarly within the unnamed witnesses' knowledge, and admitted that they did not know of any particular witnesses, and that they hoped to investigate further, they were not granted a continuance under Miss. Code Ann. § 99-15-29. Johnson v. State, 872 So. 2d 65, 2004 Miss. App. LEXIS 34 (Miss. Ct. App. 2004).

No manifest injustice resulted from the denial of defendant's motion for continuance as defendant did not present any evidence that he was unable to call an allegedly exculpatory witness during his three-week trial. Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Trial judge did not abuse his discretion in refusing to grant a continuance where defendant did not follow the proper procedure for obtaining a continuance and it came to light that the witness was unavailable and would not be available to testify at any time in the foreseeable future. McGee v. State, 828 So. 2d 847, 2002 Miss. App. LEXIS 551 (Miss. Ct. App. 2002).

The trial court properly denied the defendant's motion for a continuance based on the absence of a witness for whom two subpoenas had been issued where (1) the only action taken by the defendant or his attorney with regard to the witness was to ask the police chief if the police department had served process on the witness, which was in fact done, and (2) the motion did not detail the substance of the testimony of the absent witness or allege that the witness could be produced at a succeeding term of court. Buckley v. State, 772 So. 2d 1059, 2000 Miss. LEXIS 239 (Miss. 2000).

The trial court acted within its discretion in denying the defendant's last minute continuance request based on the absence of a witness because the materiality of the unavailable proof was, at best, marginal, and it seemed substantially likely that most, if not all, of it would prove to be inadmissible hearsay. Swanagan v. State, 759 So. 2d 442, 2000 Miss. App. LEXIS 62 (Miss. Ct. App. 2000).

Where the defendant failed to set forth the expected testimony of the witnesses and failed to utilize diligence in securing their attendance, the trial court did not abuse its discretion in denying defendant's motion for a continuance. Fikes v. State, 749 So. 2d 1107, 1999 Miss. App. LEXIS 544 (Miss. Ct. App. 1999).

Defendant was not entitled to continuance based on absence of witness where defendant issued no subpoena, defendant offered no proof of absent witness' testimony or that he attempted to procure the witness' attendance, there was adequate time for preparation between indictment and trial, and there were no discovery violations. Atterberry v. State, 667 So. 2d 622, 1995 Miss. LEXIS 630 (Miss. 1995).

Trial court did not err in denying defendant continuance due to absence of daughter, who defendant said was material witness suddenly unavailable, where defendant did not follow statutory and case law requirements, did not issue subpoena for daughter or her mother, and did not present daughter or her affidavit when he moved for new trial. Defendant alleged he did not discover daughter would be unavailable until evening before trial and it was impossible for him to issue subpoena and he could not issue affidavits required by statute. Pinson v. State, 518 So. 2d 1220, 1988 Miss. LEXIS 37 (Miss. 1988).

Circuit Court did not abuse its discretion in refusing to grant motion for continuance upon grounds that alibi witness was absent where trial judge instructed jury that it could consider, with other testimony, assertion of defendant that he would call witness who would testify that defendant was at house of witness at time and on night of rape. Johnson v. State, 511 So. 2d 1360, 1987 Miss. LEXIS 2667 (Miss. 1987).

It is contemptuous of obligation every trial counsel owes court to wait until 10 days before predetermined trial date in capital murder case to inform circuit judge of unavailability of defense expert witnesses in case in which at least 30 pretrial motions are made by thorough and aggressive defense counsel; in such case, motion for continuance on basis of absence of witnesses is properly denied. Johnson v. State, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

In a prosecution for aggravated assault, the record did not support granting a mistrial nor a continuance (even though one was never requested) due to the absence of two witnesses who were not under subpoena, and who had left the state shortly prior to trial, where defense counsel was bound to have known that both were possible witnesses from a consultation with his client, a decision to issue defense subpoenas for them were not made until the night before trial, no effort was made to subpoena them until the morning of the trial, and where, on the morning of the trial, both the state and the defense announced that they were ready. Watson v. State, 465 So. 2d 1025, 1985 Miss. LEXIS 1944 (Miss. 1985).

In a prosecution for the sale of less than one kilogram of marijuana, the trial court did not abuse its discretion in denying the defendant's motion for a continuance in order to obtain the presence of a confidential informant where the defendant had no right to call the informant as an adverse witness or to cross-examine him and where the defendant had previously been granted continuances from two terms to procure this witness but had failed to ask for an attachment against him. Tribbett v. State, 394 So. 2d 878, 1981 Miss. LEXIS 1924 (Miss. 1981).

In a prosecution for aggravated assault upon a police officer, the trial court did not abuse its discretion in denying a defense request for a continuance owing to the absence of a witness where the witness was described by the defense as "hiding from the law" and there was a distinct probability that he would be unavailable indefinitely or at least for an extended period of time. Norman v. State, 385 So. 2d 1298, 1980 Miss. LEXIS 2008 (Miss. 1980).

In a prosecution for aggravated assault with a deadly weapon, the trial court did not abuse its discretion in overruling defendant's motion for a continuance made so that a subpoenaed witness to a previous altercation between defendant and his victim could be located, where the victim had admitted that the altercation had occurred, and where both defendant and his girlfriend had also testified regarding the prior incident; the testimony of the subpoenaed witness would have been merely cumulative. Graham v. State, 381 So. 2d 138, 1980 Miss. LEXIS 1824 (Miss. 1980).

In a homicide prosecution, the trial court did not err in overruling defendant's motion to extend the trial proceedings into the next day in order to allow defendant additional time to locate a witness, where defense counsel admitted to having learned about the witness earlier that day, but no subpoena had been requested by him, and where no attempt had been made to follow the statutory procedure dealing with applications for a continuance. Herring v. State, 374 So. 2d 784, 1979 Miss. LEXIS 2347 (Miss. 1979).

Defendant's motion for a continuance on account of the absence of a witness was properly denied where no subpoena for this witness was requested or issued until the day preceding the trial, it was conceded that the witness was not in the state, no showing was made in connection with the motion as to what the testimony of the absent witness would be or that his testimony was relevant or material, and, on appellant's motion for a new trial, neither the witness nor his affidavit was produced and there was no proof of any kind to show that his testimony would be relevant or material. Dyer v. State, 300 So. 2d 788, 1974 Miss. LEXIS 1637 (Miss. 1974).

There was no error in a trial court's failure to grant a continuance to enable the defendant, charged with unlawfully driving an automobile, to obtain process upon an alleged witness, where there was nothing in the motion to show the whereabouts of the witness or any suggestion that the witness would likely be available at any future time, since the issue as to whether or not a continuance should be allowed is largely discretionary. Parham v. State, 229 So. 2d 582, 1969 Miss. LEXIS 1254 (Miss. 1969).

The court's refusal to continue a case to afford the sheriff more time to locate a defense witness, was not an abuse of discretion, where no showing was made that the witness, whom the defendant subpoenaed on the day of the trial, but who could not be found, was available or that his testimony would be relevant and material upon the question of the guilt or innocence of the defendant. Graham v. State, 229 So. 2d 548, 1969 Miss. LEXIS 1245 (Miss. 1969).

Where there was no proper showing as to the findings of the doctor who had examined the defendant to determine his sanity or what a doctor would testify to, and defendant's motion for a new trial contained no affidavits or other evidence indicating what the absent witness might testify to, or indicating any prejudice to the defendant, trial court did not commit reversible error in overruling defendant's motion for a continuance on the grounds of absence of a doctor as a witness, it further appearing that the witness had not been subpoenaed until the morning of the day of the trial. Eslick v. State, 238 Miss. 666, 119 So. 2d 355, 1960 Miss. LEXIS 454 (Miss. 1960).

Continuance because of absence of witness beyond the jurisdiction of the state will be denied where attorneys did not exercise the persistence and diligence required. Simmons v. State, 206 Miss. 535, 40 So. 2d 289, 1949 Miss. LEXIS 281 (Miss. 1949).

Refusal of trial court in murder prosecution to grant defendant continuance because of absence of material witness, upon whom an attachment had been served, but who was physically unable to attend the trial, did not constitute reversible error where there was no affidavit of the absent witness, or other showing as to what witness would have testified to, or in what respect the testimony of such witness would have supported a defense of justifiable homicide. Spearman v. State, 204 Miss. 865, 35 So. 2d 527, 1948 Miss. LEXIS 413 (Miss. 1948).

Denial of new trial grounded upon refusal of continuance on account of absence of witnesses by whom defendant claimed he could prove an alibi in prosecution for grand larceny, was warranted where defendant failed to procure the affidavits of such witnesses as to what their testimony would have been. Russell v. State, 203 Miss. 883, 34 So. 2d 722, 1948 Miss. LEXIS 334 (Miss. 1948).

Denial in murder prosecution of motion for continuance alleging that absent witness would testify that on day of homicide and only shortly before it occurred deceased made a deadly assault on accused's codefendant and threatened to kill him on sight, was not error, where accused himself testified repeatedly that he knew of no trouble between deceased and codefendant. Criss v. State, 202 Miss. 184, 30 So. 2d 613, 1947 Miss. LEXIS 257 (Miss. 1947).

Refusal of a continuance is not error where the absent witness' testimony would only have been cumulative and tended to impeach that of a state's witness, these facts being indicated in a letter from the witness who gave no affidavit although she could have done so. Parker v. State, 201 Miss. 579, 29 So. 2d 910, 1947 Miss. LEXIS 423 (Miss. 1947).

Motion for continuance in manslaughter prosecution on ground of absence of witness was properly overruled where no proof was offered and the motion contained no information as to the whereabouts of the witness or set out sufficiently what efforts were made to secure his attendance or ascertain his whereabouts, and witness had not been served with process and no further process was requested, and where no motion was made for a new trial and the affidavit of the absent witness was not produced. Cody v. State, 24 So. 2d 745 (Miss. 1946).

Trial court in prosecution for unlawful cohabitation did not abuse its discretion in denying application for continuance because of absence of witness who was in the armed forces, where no subpoena had been issued or requested for him, there was no showing that he would be available at any future trial of the case, and witness' testimony given at previous trial of defendants for the same offense was read to the jury with consent of the district attorney. Strong v. State, 199 Miss. 17, 23 So. 2d 750, 1945 Miss. LEXIS 266 (Miss. 1945).

Denial of continuance in murder prosecution because of inaccessibility of material witness did not constitute abuse of discretion where proposed testimony related to alleged threat by deceased against accused and accused was defending on the ground of self defense against an actual battery. Kilgore v. State, 198 Miss. 816, 23 So. 2d 690, 1945 Miss. LEXIS 252 (Miss. 1945).

Trial judge in murder prosecution did not abuse his discretion in refusing to grant defendant a continuance on the ground that a material witness was in the armed forces abroad, where the proposed testimony of the witness concerned an alleged threat by the deceased against defendant, whereas defendant sought to justify his act as being in self defense against an actual battery during which he gave ground against an aggressive and continued assault by deceased. Kilgore v. State, 198 Miss. 816, 23 So. 2d 690, 1945 Miss. LEXIS 252 (Miss. 1945).

Refusal in murder prosecution to grant a continuance based upon absence of a nonresident witness was not error, where defendant had made no effort to procure witness's presence at the trial and there was no proof that he would likely be available as a witness at any future trial of the case. Ellis v. State, 198 Miss. 804, 23 So. 2d 688, 1945 Miss. LEXIS 250 (Miss. 1945).

It was not error to deny continuance because of absence of a witness who could testify as to dying declaration of one shot by defendant to the effect that he would have shot defendant if his gun had been loaded, where application for continuance was silent as to whether deceased would have shot in self-defense or as an aggressor. Woulard v. State, 137 Miss. 808, 102 So. 781, 1925 Miss. LEXIS 23 (Miss. 1925).

Refusal to grant continuance to defendant charged with assault with intent to murder on the ground of the absence of a witness who allegedly saw prosecuting witness soon after he was shot and to whom prosecuting witness related the details of the shooting, was error, where prosecuting witness denied having stated the facts which defendant alleged would be proved by the absent witness. Cade v. State, 96 Miss. 434, 50 So. 554, 1910 Miss. LEXIS 146 (Miss. 1910).

13. —Illness of witness; properly granted.

Trial court's refusal to grant a continuance to a father, who was charged with shooting a 17-year-old boy for slapping his daughter, was erroneous, where the affidavit in support of the motion for continuance showed that the accused's wife, a witness to the shooting, was hospitalized and averred that she would testify that the victim was the aggressor to the affray and that the accused shot in apparent self defense, and it further appeared that as a result of the absence the witness, the accused was compelled to testify in his own behalf whether he had desired to do so or not, since otherwise the state's case would have stood undisputed. Ivy v. State, 229 Miss. 491, 91 So. 2d 521, 1956 Miss. LEXIS 630 (Miss. 1956).

In prosecution for knowingly receiving stolen property where defendant made a motion for continuance on the ground that his wife who was a material witness in his behalf was confined to hospital and unable to appear, an overruling of the motion was error. Whittington v. State, 215 Miss. 377, 60 So. 2d 813, 1952 Miss. LEXIS 576 (Miss. 1952).

A defendant is entitled to a continuance on account of the absence of his wife who is a material witness for him and is sick and unable to attend. Walker v. State, 129 Miss. 449, 92 So. 580, 1922 Miss. LEXIS 60 (Miss. 1922).

The court cannot adjourn to a place where a sick witness resides to take testimony of such witness; the court should have granted the continuance asked for on that ground. Carter v. State, 100 Miss. 342, 56 So. 454, 1911 Miss. LEXIS 41 (Miss. 1911).

A material witness within the jurisdiction of the court properly served with process but sick and unable to testify and no other witness by which such facts can be proven entitles to continuance. State v. Vollm, 96 Miss. 651, 51 So. 275 (Miss. 1910).

14. — —Properly denied.

There was no abuse of discretion in denying a continuance on the ground of absence of a witness where the motion, made on day of trial, was unsupported by proper proof that the witness was actually in a hospital, and, the movant-accused made no offer of more evidence about the absent witness, failed to renew motion after evidence at trial indicated the witness was in hospital and, on motion for new trial, made no attempt to present the witness to the court for examination. Gates v. State, 484 So. 2d 1002, 1986 Miss. LEXIS 2421 (Miss. 1986).

In prosecution for robbery where testimony of prosecuting witnesses was overwhelming in identifying the accused as the perpetrator of robbery, the fact that one defense witness whose testimony would show that one prosecuting witness had first identified someone else as guilty party was unable to testify because of illness, was not error where the court denied continuance. Payne v. State, 215 Miss. 390, 61 So. 2d 146, 1952 Miss. LEXIS 578 (Miss. 1952).

A motion for continuance was properly overruled where the state admitted the context of the testimony proposed to be obtained from witnesses summoned but failing to appear because of illness. Sistrunk v. State, 200 Miss. 437, 27 So. 2d 606, 1946 Miss. LEXIS 307 (Miss. 1946).

15. —Absence of documents and other evidence.

In a case involving the sale of cocaine, a violation of Miss. Unif. Cir. & Cty. R. 9.04 relating to the disclosure of an informant's name one day prior to trial was considered harmless because there was no miscarriage of justice; therefore, a continuance was properly denied. Defense counsel had the opportunity to interview the informant outside the presence of the jury, and the informant admitted in front of the jury that he was manipulative, a drug addict, a liar, and a thief. Mosely v. State, 4 So. 3d 1069, 2009 Miss. App. LEXIS 106 (Miss. Ct. App. 2009).

At the beginning of a murder trial, the court did not abuse its discretion in denying defendant's motion for a continuance so that he could obtain the results of the toxicology screen on the victim's blood. The fact that the victim was using cocaine did not indicate that he was the aggressor. Flaggs v. State, 999 So. 2d 393, 2008 Miss. App. LEXIS 333 (Miss. Ct. App. 2008), cert. dismissed, dismissed without prejudice, cert. denied, 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

Defendant's request for a continuance to procure a toxicology report and to locate three witnesses was properly denied because defendant suffered no manifest injustice as a result: (1) a forensic pathologist testified that the victim had a blood-alcohol content of .03 at the time defendant shot and killed him and that the victim had inhaled some marijuana shortly before defendant shot him; and (2) defendant had months before his trial to locate the witnesses, interview them, and subpoena them for trial. Defendant did not indicate to what those witnesses would have testified or how their testimony would have benefitted the defense, and defendant made no effort to comply with Miss. Code Ann. § 99-15-29. Gilbert v. State, 934 So. 2d 330, 2006 Miss. App. LEXIS 241 (Miss. Ct. App. 2006).

There is no abuse of discretion in denying defendant's motion for a continuance on the ground that the reporter had been unable to make a transcript of proceeding on a preceding mistrial, where defendant has other methods of establishing what the state's witnesses had testified to, and the case is otherwise ready. Holmes v. State, 242 Miss. 407, 134 So. 2d 485, 1961 Miss. LEXIS 576 (Miss. 1961).

This section [Code 1942, § 1520] is not controlling except in the case of an absent witness or documents, one being accused of crime being entitled to be present and to be tried only when he is physically and mentally capable of intelligently conferring with his counsel as to the merits of the case and testifying in his own behalf. Eastland v. State, 223 Miss. 115, 223 Miss. 195, 78 So. 2d 127, 1955 Miss. LEXIS 369 (Miss. 1955).

16. —Absence or illness of defendant.

Trial court did not abuse its discretion, and the court found no manifest injustice, in the trial court's denial of defendant's motion for a continuance; defendant had previously been granted a continuance and was given the opportunity to present certain evidence, but he failed to do so, and while the trial court denied this continuance, the trial court did offer to make physical and medical accommodations for defendant during trial. Davis v. State, 995 So. 2d 767, 2008 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Where the accused was physically unable to intelligently confer with his counsel and there was testimony of four physicians that he was too ill to stand trial, it was an error to deny a motion for continuance, even though the right to grant or deny continuance is in trial court's discretion. Eastland v. State, 223 Miss. 115, 223 Miss. 195, 78 So. 2d 127, 1955 Miss. LEXIS 369 (Miss. 1955).

Sickness of defendant resulting from the drinking of large quantities of liquor before trial is not ground for continuance. Bourne v. State, 103 Miss. 628, 60 So. 724, 1912 Miss. LEXIS 209 (Miss. 1912).

Where one accused of unlawful sale of intoxicating liquor was physically unable to attend her trial and it was shown that she was the only material witness to contradict the contentions of the prosecution, it was error to refuse her a continuance to the next term or to a later day in the term when she could be present. Corbin v. State, 99 Miss. 486, 55 So. 43, 1911 Miss. LEXIS 217 (Miss. 1911).

A defendant too ill to attend trial for misdemeanor should have her case continued. Hoggett v. State, 99 Miss. 844, 56 So. 172, 1911 Miss. LEXIS 259 (Miss. 1911); Johnson v. State, 108 Miss. 709, 67 So. 177, 1914 Miss. LEXIS 263 (Miss. 1914).

17. Miscellaneous.

Court rejected defendant's claim of ineffective assistance of counsel, given that the court failed to see how asking for a continuance constituted deficient performance in this instance, plus defendant failed to show prejudice. Ray v. State, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Trial court did not abuse its discretion or cause an injustice to occur when it failed to move for a continuance sua sponte or to grant a continuance at the request of the inmate because there was no proof in the record to support the inmate's allegation that he had retained his own counsel, a proposed receipt did not state that it was for representation of the inmate's case, and the inmate's appointed counsel was present and ready for trial. Harris v. State, 999 So. 2d 436, 2009 Miss. App. LEXIS 13 (Miss. Ct. App. 2009).

Defendant failed to meet his burden of proof that the trial court's denial of a continuance was an abuse of discretion where the trial court had an opportunity to view defendant, consider his appearance, and to hear argument of counsel on the issue. Piercy v. State, 850 So. 2d 219, 2003 Miss. App. LEXIS 656 (Miss. Ct. App. 2003).

The defendant failed to show that manifest injustice resulted from the denial of a continuance she requested on the grounds that she did not know a transcript of her first trial existed until the morning of the second trial and was therefore denied the use of the transcript to impeach witnesses as a review of the record did not show any prejudice suffered by her. Bogan v. State, 2000 Miss. App. LEXIS 233 (Miss. Ct. App. May 16, 2000), op. withdrawn, sub. op., 811 So. 2d 286, 2001 Miss. App. LEXIS 23 (Miss. Ct. App. 2001).

A trial court did not err in refusing to delay the trial until the defendant, who was deaf, could be taught to use sign language where the court had no way of ascertaining whether the defendant would learn sign language nor the degree to which it could improve his ability to understand and communicate, the defendant was able to read, he was a high school graduate and a college student, and he was kept advised of what was being argued and what testimony was being presented during the trial. Shook v. State, 552 So. 2d 841, 1989 Miss. LEXIS 449 (Miss. 1989).

Trial court did not abuse its discretion in refusing a continuance on grounds that there was a variance between the indictment charging attempted murder and the capias charging assault and battery with intent to kill, where both the capias and a copy of the indictment were served on the defendant, and before the request for a continuance was considered, a demurrer to the indictment was filed, argued and overruled, therefore showing that defense counsel must have known the indictment charged the crime of attempted murder. Ledet v. State, 286 So. 2d 817, 1973 Miss. LEXIS 1320 (Miss. 1973).

Defendant was not entitled to a continuance so that he could work and earn money with which to employ an attorney, nor was he entitled to a continuance so that his relatives might agree to help him obtain an attorney. Burnett v. State, 285 So. 2d 783, 1973 Miss. LEXIS 1305 (Miss. 1973).

The voluntary substitution of counsel by a litigant during the course of trial is not, of itself, grounds for a continuance. Ladnier v. State, 273 So. 2d 169, 1973 Miss. LEXIS 1560 (Miss. 1973).

In prosecution for murder a motion for continuance on the ground that publicity given to a previous trial of codefendant in the same murder would deny the defendant a fair trial, was properly denied when it was not shown that the conditions were changed, the granting of a continuance being largely within the discretion of the trial judge. Sorber v. State, 225 Miss. 436, 76 So. 2d 234, 84 So. 2d 429, 1956 Miss. LEXIS 395 (Miss. 1956).

No abuse of discretion by trial court was shown in denying a motion for continuance of manslaughter trial on ground that relative of one of defendant's attorneys had been killed and others seriously injured in accident four days before day set for trial where the record failed to show that before the summoning of the venire, the court had been requested to pass the case for trial, experienced associate counsel appeared to have the case well in hand when tried, and the denial did not prevent the defendant from producing any witness desired. Williams v. State, 26 So. 2d 64 (Miss. 1946).

18. Due diligence.

Denial of defendant's motion for continuance to obtain presence of a witness, who was in federal custody in another state, on ground that motion was untimely was not an abuse of discretion; defendant only requested witness be present on Friday before trial, defendant relied solely on state to secure witness, process to secure such a prisoner generally required 30 to 90 days, and defendant failed to file an affidavit showing facts expected to be proven by absent witness, the name and address of witness, statement that affiant had used due diligence to obtain witness, and a statement that continuance was sought not for delay only. Medina v. State, 688 So. 2d 727, 1996 Miss. LEXIS 635 (Miss. 1996).

In a prosecution for delivery of a controlled substance and possession of a controlled substance with intent to distribute, the trial court did not abuse its discretion when it denied the defendants' motion for a continuance to afford them "an opportunity to locate the confidential informer" where the defendants had previously obtained a continuance because the informant was not available and spent six months "doing nothing," the defendants did not file the motion at issue until the day before trial, there was nothing in the record detailing the prosecution's efforts, or lack thereof, to produce the confidential informant, and there was nothing suggesting prosecutorial bad faith while the record reflected substantial defense dilatoriness. Bosarge v. State, 594 So. 2d 1143, 1991 Miss. LEXIS 994 (Miss. 1991).

In a prosecution for forgery of a check, the trial court did not err in refusing to grant a continuance to the defendant where the record failed to show that the defendant had used due diligence to procure the presence of an absent witness. Harper v. State, 394 So. 2d 311, 1981 Miss. LEXIS 1934 (Miss. 1981).

Refusal to grant motion for continuance because of absence of material witness, was held justified where due diligence was not shown and no effort on part of the defendant to procure the presence of the witness was made until the trial was practically in progress and the motion for a new trial was not followed up by the affidavit of the absent witness. Thigpen v. State, 206 Miss. 87, 39 So. 2d 768, 1949 Miss. LEXIS 244 (Miss. 1949); Ford v. State, 227 So. 2d 454, 1969 Miss. LEXIS 1355 (Miss. 1969).

Cases in which defendant used reasonable diligence to have material witness present who was then in the jurisdiction of the court in which it is held a continuance should have been granted. Watts v. State, 90 Miss. 757, 44 So. 36, 1907 Miss. LEXIS 106 (Miss. 1907); Magee v. State, 45 So. 360 (Miss. 1908); White v. State, 95 Miss. 75, 48 So. 611, 1909 Miss. LEXIS 221 (Miss. 1909); Dobbs v. State, 96 Miss. 786, 51 So. 915, 1910 Miss. LEXIS 205 (Miss. 1910).

19. Setting aside continuance.

Reversal by court of order allowing continuance and reinstatement of the case in the absence of defendants and their attorney, constituted an abuse of discretion. Jackson v. State, 199 Miss. 853, 25 So. 2d 483, 1946 Miss. LEXIS 253 (Miss. 1946), limited, Minneweather v. State, 55 So. 2d 160 (Miss. 1951).

The continuance should not be set aside on petition of disinterested third parties in the absence of accused or his attorney. Campbell v. State, 50 So. 499 (Miss. 1909).

20. Appeal.

In a case involving defendant's sexual battery and fondling of his stepdaughters, an issue relating to the denial of his second motion for a continuance was not heard on review because defendant failed to raise this alleged error in a post-trial motion for a new trial. Palmer v. State, 986 So. 2d 328, 2007 Miss. App. LEXIS 737 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 567 (Miss. 2008).

Decision to grant or deny continuance is left to sound discretion of trial court, and unless manifest injustice appears to have resulted from denial of continuance, the Supreme Court should not reverse. Atterberry v. State, 667 So. 2d 622, 1995 Miss. LEXIS 630 (Miss. 1995).

Defendant who does not raise failure to grant continuance as ground in motion for new trial is procedurally barred from raising issue on appeal. Pool v. State, 483 So. 2d 331, 1986 Miss. LEXIS 2370 (Miss.), cert. denied, 476 U.S. 1160, 106 S. Ct. 2280, 90 L. Ed. 2d 722, 1986 U.S. LEXIS 1548 (U.S. 1986).

RESEARCH REFERENCES

ALR.

Hostile sentiment or prejudice as ground for continuance of criminal trial. 39 A.L.R.2d 1314.

Right to accused to continuance because of absence of witness who is fugitive from justice. 42 A.L.R.2d 1229.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 A.L.R.3d 725.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 A.L.R.4th 659.

Am. Jur.

17 Am. Jur. 2d, Continuance §§ 46-48 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 151 et seq. (continuance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 49 et seq.

CJS.

22A C.J.S., Criminal Law §§ 876 et seq.

§ 99-15-31. Continuance; capital cases.

Application for continuance in capital cases shall not be entertained after the drawing of any special venire which is summoned to appear on the day the case is set for trial, except for causes arising afterward, unless a good excuse be shown for not having made the application before.

HISTORY: Codes, 1880, § 3059; 1892, § 1409; Laws, 1906, § 1482; Hemingway's 1917, § 1240; Laws, 1930, § 1263; Laws, 1942, § 2506; Laws, 1985, ch. 443, § 3, eff from and after July 1, 1985.

Cross References — Continuance where counsel is legislator, see § 11-1-9.

JUDICIAL DECISIONS

1. In general.

Under this section [Code 1942, § 2506] one charged with a felony less than capital is not entitled to greater consideration than one who was charged with a capital felony. Hathorn v. State, 225 Miss. 77, 82 So. 2d 653, 1955 Miss. LEXIS 561 (Miss. 1955).

Where a defendant asks for a continuance because of the absence of a witness before the special venire is drawn and it is overruled, and he fails to renew his application at the trial and does not complain thereof in his motion for a new trial, he cannot secure the reversal in the supreme court of an adverse judgment because thereof. Lamar v. State, 63 Miss. 265, 1885 Miss. LEXIS 60 (Miss. 1885).

The court may refuse an application for a continuance on the ground of the absence of any witness who had not been subpoenaed and made his appearance prior to the drawing of the special venire, "unless for cause coming to the knowledge of the defendant after the drawing of the special venire." Penn v. State, 62 Miss. 450, 1884 Miss. LEXIS 102 (Miss. 1884).

A defendant is not entitled to a continuance when his case is called for trial on the ground of the absence of a witness who, having been subpoenaed before the drawing of the special venire, was then absent, unless good cause can be shown for his failure to make the application before the drawing of the venire. Fletcher v. State, 60 Miss. 675, 1882 Miss. LEXIS 112 (Miss. 1882).

RESEARCH REFERENCES

ALR.

Hostile sentiment or prejudice as ground for continuance of criminal trial. 39 A.L.R.2d 1314.

Am. Jur.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 171 et seq. (continuance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 49 et seq.

§ 99-15-33. Continuance; admission of facts in absence of witness.

In all cases of application for continuance, it shall be lawful for the state or the defendant to make any admission of any fact sought to be proved by the other party by any absent witness, and such admission shall have the same effect as if the absent witness or other evidence were present in court, and no more; but if compulsory process will probably obtain the attendance of the absent witness, and the defendant have not had opportunity of obtaining such process, the cause shall be continued, unless the defendant desire a trial.

HISTORY: Codes, 1857, ch. 64, art. 302; 1871, § 2806; 1880, § 3077; 1892, § 1425; 1906, § 1498; Hemingway's 1917, § 1256; 1930, § 1279; 1942, § 2522.

JUDICIAL DECISIONS

1. In general.

A motion for continuance was properly overruled where the state admitted the context of the testimony proposed to be obtained from witnesses summoned but failing to appear because of illness. Sistrunk v. State, 200 Miss. 437, 27 So. 2d 606, 1946 Miss. LEXIS 307 (Miss. 1946).

At the first term of court after indictment and arrest of defendant the defendant is entitled to a continuance on account of the absence of a material witness within the jurisdiction of the court. Walton v. State, 87 Miss. 296, 39 So. 689, 1905 Miss. LEXIS 129 (Miss. 1905); Knox v. State, 97 Miss. 523, 52 So. 695, 1910 Miss. LEXIS 265 (Miss. 1910).

Error in refusing a continuance because of the absence of a witness is not cured by permitting defendant to read in evidence an affidavit averring what the witness would swear if present. Scott v. State, 80 Miss. 197, 31 So. 710, 1902 Miss. LEXIS 239 (Miss. 1902); Montgomery v. State, 85 Miss. 330, 37 So. 835, 1904 Miss. LEXIS 158 (Miss. 1904), overruled, Flowers v. State, 101 Miss. 108, 57 So. 226, 1911 Miss. LEXIS 94 (Miss. 1911).

It is proper under this section [Code 1942, § 2522] to charge that the same weight should be given to the written testimony of an absent witness as would be given to his oral testimony on the stand. Lee v. State, 75 Miss. 625, 23 So. 628, 1898 Miss. LEXIS 41 (Miss. 1898).

Absence of a material witness is no ground for a continuance even in a capital case if there have been opportunity for compulsory process which has not been obtained. Thomas v. State, 61 Miss. 60, 1883 Miss. LEXIS 72 (Miss. 1883).

The statute has no application until the showing for a continuance has been so made out to the satisfaction of the court that, but for the proposed admission of the evidence of the absent witness, a continuance would be proper. Strauss v. State, 58 Miss. 53, 1880 Miss. LEXIS 92 (Miss. 1880).

RESEARCH REFERENCES

ALR.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 A.L.R.3d 725.

§ 99-15-35. Change of venue; how need shown; grounds.

On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 6; 1857, ch. 64, art. 298; 1871, § 2762; 1880, § 3061; 1892, § 1411; 1906, § 1484; Hemingway's 1917, § 1242; 1930, § 1265; 1942, § 2508.

Cross References — Transfer of records to removal court, see § 99-15-37.

Change of venue in capital cases, see § 99-15-43.

Pre-trial publicity, see MRCrP 18.9.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Examination of witnesses.
3. Reasons for change.
4. Review.
5. Particular circumstances.
6. Publicity.
7. Fair trial.
8. Discretion.
9. Rebuttal of presumption.

1. In general.

Because defendant never applied for a change of venue in the trial court, he was procedurally barred from raising this argument on appeal. Neal v. State, 15 So. 3d 388, 2009 Miss. LEXIS 272 (Miss. 2009), dismissed, — So. 3d —, 2016 Miss. LEXIS 340 (Miss. 2016).

Despite the fact that defendant's motion for change of venue created a rebuttable presumption of doubt that an impartial jury could be obtained, the State's witnesses at the hearing and the voir dire proceedings rebutted any presumption that an impartial jury could not be obtained and there was nothing in the record of such quality and weight to indicated that the circuit judge abused his discretion in denying the motion. Defendant sought to change venue based on pretrial publicity and based on claim that the victim's family had a lot of influence in the community. McCune v. State, 989 So.

2d 310, 2008 Miss. LEXIS 347 (Miss. 2008).

Defendant's issue with respect to the denial of his motion for a change of venue was not made in writing, sworn to by defendant, or supported by affidavits from at least two credible persons; therefore, the issue was without merit because defendant failed to comply with Miss. Code Ann. § 99-15-35, and it was within the trial court's discretion to deny the motion. Smith v. State, 981 So. 2d 1025, 2008 Miss. App. LEXIS 275 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion in denying defendant's motion for a change of venue as the presumption the State acknowledged was raised, that defendant could not obtain an impartial jury in the county where the murder victim resided, was rebutted by the State's evidence that most veniremen did not know about the crime and the absence of any persuasive proof of overly prejudicial pretrial publicity. Grayson v. State, 806 So. 2d 241, 2001 Miss. LEXIS 303 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800 (U.S. 2002).

An application for change of venue must conform strictly to this section. Baldwin v. State, 732 So. 2d 236, 1999 Miss. LEXIS 76 (Miss. 1999).

An application for change of venue was statutorily deficient where the motion for change of venue itself was not sworn to by the prisoner as is specifically required by this section. Baldwin v. State, 732 So. 2d 236, 1999 Miss. LEXIS 76 (Miss. 1999).

Usual procedure employed when accused believes he cannot get impartial jury in particular county is motion for change of venue. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Decision to grant venue change is in sound discretion of trial judge. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Presumption that impartial jury could not be impaneled may be rebutted by state's demonstration that impartial jury was actually impaneled, for purposes of determining whether venue was proper. Morgan v. State, 681 So. 2d 82, 1996 Miss. LEXIS 429 (Miss. 1996).

Trial court did not abuse its discretion in denying change of venue request in highly publicized trial where close study of record revealed that no reasonable jury could have returned different verdict. Defendant had introduced 6 witnesses who were employed by various media outlets who all testified they provided thorough news coverage of murder investigation; state only produced 2 witnesses who testified they thought defendant could receive fair trial and they had not heard of community sentiment of ill will toward defendant or prejudgment of his guilt. All but 8 of 79 persons in venire stated they had heard about case but court determined that jury did not compromise defendant's right to fair trial where record revealed that 14 prospective jurors who had heard about murder and formed opinion as to defendant's guilt or innocence were questioned and excused for cause; of remaining prospective jurors who indicated they had heard about case, all indicated they could render a verdict based only on evidence presented at trial. Lutes v. State, 517 So. 2d 541, 1987 Miss. LEXIS 2931 (Miss. 1987).

When accused has complied with proper application requirement by making motion supported by affidavits of 2 or more witnesses in conformance with this section, presumption arises that impartial jury may not be obtained; this presumption is normally rebuttable and may be rebutted during voir dire; however, this does not mean that trial court should delay ruling on defendant's motion until after voir dire. Lutes v. State, 517 So. 2d 541, 1987 Miss. LEXIS 2931 (Miss. 1987).

Even in light of the relaxation of change of venue requirements announced in recent cases, a defendant, in order to obtain a change of venue, is required to make some showing by testimony of local citizens that he cannot receive a fair trial in the community. Irving v. State, 498 So. 2d 305, 1986 Miss. LEXIS 2518 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826, 1987 U.S. LEXIS 2032 (U.S. 1987).

The proper application requirement for change of venue is a motion supported by affidavits of 2 or more witnesses, alleging that by prejudgment of the case, or a grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed. White v. State, 495 So. 2d 1346, 1986 Miss. LEXIS 2698 (Miss. 1986).

The decision regarding a change of venue in a criminal proceeding is committed to the sound discretion, not the unfettered discretion, of the trial judge. White v. State, 495 So. 2d 1346, 1986 Miss. LEXIS 2698 (Miss. 1986).

Trial judge did not abuse his discretion in overruling homicide defendant's motion for change of venue, where there was no over-saturated media coverage, and, with one exception, newscast's and articles were typical and objective, and, since record did not contain the voir dire of prospective juror, it must be assumed that jurors who were seated had stated that they could give defendant a fair trial. Weeks v. State, 493 So. 2d 1280, 1986 Miss. LEXIS 2614 (Miss. 1986).

A motion for change of venue was properly denied as being invalid, where it was not supported by affidavits of two or more credible persons. Gilliard v. State, 428 So. 2d 576, 1983 Miss. LEXIS 2437 (Miss.), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179, 1983 U.S. LEXIS 1737 (U.S. 1983), disapproved, Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, 1986 U.S. LEXIS 150 (U.S. 1986).

In a prosecution for capital murder, the trial court properly denied the defendant's motion for a change of venue, where the motion was not supported by affidavits of two or more credible persons as required by this section. Gentry v. State, 416 So. 2d 650, 1982 Miss. LEXIS 2031 (Miss. 1982).

The defendant whose motion for a change of venue fails to comply with the requirements of Code 1942, § 2508 cannot on appeal assert that he was entitled to such a change by reason of pretrial publicity tending to prejudice the jury. Fabian v. State, 267 So. 2d 294, 1972 Miss. LEXIS 1408 (Miss. 1972).

Under the Fourteenth Amendment right to an impartial jury a defendant in a state misdemeanor prosecution to be tried by a jury must be given an opportunity to show that a change of venue is required in his case because of community prejudice against him, and a state law which categorically prevents a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant, on the sole ground that the charge against him is labeled a misdemeanor, is unconstitutional. Groppi v. Wisconsin, 400 U.S. 505, 91 S. Ct. 490, 27 L. Ed. 2d 571, 1971 U.S. LEXIS 88 (U.S. 1971).

In a murder prosecution, the court properly overruled defendant's motion for a change of venue, which was made after the special venire had been summoned and while the jury was being impaneled to try the defendant, and which was not supported by the affidavits of two or more credible persons. Thompson v. State, 231 Miss. 624, 97 So. 2d 227, 1957 Miss. LEXIS 546 (Miss. 1957).

Denial, dictated into the record by the state, that a prisoner cannot get a fair and impartial trial does not meet the requirement that an affidavit for change of venue be met by the state by proof. McGee v. State, 200 Miss. 350, 26 So. 2d 680, 1946 Miss. LEXIS 298 (Miss. 1946).

It is not necessary that the prisoner himself swear to the application for change of venue where it appears from the affidavit of counsel filed before trial that the prisoner seems to be either insane or so shocked and mentally unbalanced since his arrest as to be unable to make a coherent statement and aid counsel in preparation of his defense. McGee v. State, 200 Miss. 350, 26 So. 2d 680, 1946 Miss. LEXIS 298 (Miss. 1946).

An application for a change of venue must conform strictly to this section [Code 1942, § 2508]. Purvis v. State, 71 Miss. 706, 14 So. 268 (Miss. 1893).

The prepayment of costs cannot be made a condition precedent to a change of venue. Rattray v. State, 61 Miss. 377, 1883 Miss. LEXIS 141 (Miss. 1883).

2. Examination of witnesses.

Application for change of venue in murder case held to present prima facie showing for change which state had right to contest by evidence. Wexler v. State, 167 Miss. 464, 142 So. 501, 1932 Miss. LEXIS 203 (Miss. 1932).

A proper application for change of venue present a prima facie showing for a change, which may be contested by the district attorney or the court may examine witnesses. Magness v. State, 103 Miss. 30, 60 So. 8, 1912 Miss. LEXIS 136 (Miss. 1912).

The statute does not give defendant a right to change of venue necessarily upon his compliance with its terms. The court has the right to examine other witnesses. Weeks v. State, 31 Miss. 490, 1856 Miss. LEXIS 107 (Miss. 1856); Mask v. State, 32 Miss. 405, 1856 Miss. LEXIS 225 (Miss. 1856); Cavanah v. State, 56 Miss. 299, 1879 Miss. LEXIS 116 (Miss. 1879); Dillard v. State, 58 Miss. 368, 1880 Miss. LEXIS 137 (Miss. 1880).

3. Reasons for change.

There is no constitutional right to have a jury mirror any particular community; thus, a capital murder defendant, who was granted a change of venue because of pretrial publicity, was not improperly denied a second change of venue to a county in which the racial makeup more closely reflected that of the county where the crime occurred where the jury that tried the defendant was selected in a nondiscriminatory manner, and there was no evidence that the jurors were not impartial. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A trial court did not err in refusing to grant a change of venue when 54 out of the 106 persons in the venire had either discussed the case, read about it in the newspaper or had other knowledge concerning the case; the percentage of venire persons who have heard of the case is not, in and of itself, indicative of the need for a change of venue. Shook v. State, 552 So. 2d 841, 1989 Miss. LEXIS 449 (Miss. 1989).

Change of venue requested by defendant ordinarily should be granted in capital case where, under totality of circumstances, it appears reasonably likely that, in absence of such relief, defendant may lose his right to fair trial. Foster v. State, 508 So. 2d 1111, 1987 Miss. LEXIS 2557 (Miss. 1987), overruled in part, Powell v. State, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

A record showing that the defendant charged with rape was black and the victim was white, that a series of rapes had occurred in the community, that there was a supposition that defendant was guilty of other crimes, and that there had been extensive local media coverage, did not give rise to an irrebutable presumption that defendant could get a fair trial in the county where the offense was charged to have occurred, and, since the unfair trial presumption was rebuttable, the trial court did not err in overruling defendants' motion for change of venue, where the state had met its burden in rebutting the presumption. White v. State, 495 So. 2d 1346, 1986 Miss. LEXIS 2698 (Miss. 1986).

Trial judge did not abuse his discretion in overruling homicide defendant's motion for change of venue, where there was no over-saturated media coverage, and, with one exception, newscast's and articles were typical and objective, and, since record did not contain the voir dire of prospective juror, it must be assumed that jurors who were seated had stated that they could give defendant a fair trial. Weeks v. State, 493 So. 2d 1280, 1986 Miss. LEXIS 2614 (Miss. 1986).

The trial court's refusal in a capital murder prosecution to grant another change of venue from Harrison County did not deprive defendant of the right to have his case fairly and impartially tried and uninfluenced by the preponderant sentiment of the community, even though the trial court might better have moved the trial further away from Hancock County, where the reasons given for the move to Harrison County were that it had a continuous court term as opposed to the ten-week term in Hancock County, and that it would be more possible to select twelve jurors from the larger Harrison County. Billiot v. State, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

A motion for a change of venue, rather than a motion for continuance, is the usual procedure where an accused fears that he will be unable to get an impartial jury because of prejudicial pretrial publicity. Wilson v. J. Ed Turner, Inc., 221 So. 2d 368, 1969 Miss. LEXIS 1497 (Miss. 1969).

It is not necessary, in order for a defendant to be entitled to a change of venue, that it shall appear that every otherwise qualified juror in the county where the offense is charged to have been committed has prejudged the defendant's case or bears a grudge or ill will against him, and the defendant should not be denied a change of venue, although it may appear that twelve unbiased men may be found in the county to try him. Gaddis v. State, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

Motion for change of venue properly denied where evidence showed that a fair proportion of the people qualified for jury service in the county where qualified to try defendant's case fairly and impartially and that there was no preponderant sentiment in the county against him. Gaddis v. State, 207 Miss. 508, 42 So. 2d 724, 1949 Miss. LEXIS 359 (Miss. 1949).

Motion for change of venue in criminal case is properly overruled when state shows by testimony of county officers and citizens from different parts of county that there is no aroused popular feeling against defendant, no public sentiment against him and that he can get a fair trial in county. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

A change of venue should be granted only for reasons given in this section [Code 1942, § 2508]. Long v. State, 133 Miss. 33, 96 So. 740, 1923 Miss. LEXIS 108 (Miss. 1923).

It is not necessary for the accused to show that every otherwise qualified juror in the county was prejudiced against him in order that he may be entitled to a change of venue. Keeton v. State, 132 Miss. 732, 96 So. 179, 1923 Miss. LEXIS 49 (Miss. 1923).

It is not error to refuse a change of venue where the record shows a fair and impartial trial. Walden v. State, 129 Miss. 686, 92 So. 820, 1922 Miss. LEXIS 81 (Miss. 1922).

A change of venue should be granted where the evidence shows that a fair and impartial trial cannot be had. Anderson v. State, 92 Miss. 656, 46 So. 65, 1908 Miss. LEXIS 203 (Miss. 1908); Eddins v. State, 110 Miss. 780, 70 So. 898, 1916 Miss. LEXIS 203 (Miss. 1916).

4. Review.

After declaring a mistrial, the circuit judge erred in transferring venue to another county on its own motion over defendant's objection because the transfer of venue in a criminal case required defendant's sworn petition, but defendant made no such petition in the current case; thus, the case had to be remanded for trial in Yazoo County. Miles v. State, 204 So. 3d 745, 2016 Miss. LEXIS 485 (Miss. 2016).

Trial court erred in denying defendant's motion for a change of venue in light of the fact that the State failed to rebut the presumption that arose upon defendant's application for a change of venue. The State simply requested to proceed with voir dire without putting forth any witnesses or submitting any affidavits. Davis v. State, 196 So. 3d 194, 2016 Miss. App. LEXIS 448 (Miss. Ct. App. 2016).

Defendant's change of venue issue was without merit because defendant did not file a proper motion for change of venue, and there was no indication that defendant did not receive a fair trial by an impartial jury. Copple v. State, 117 So. 3d 651, 2013 Miss. App. LEXIS 421 (Miss. Ct. App. 2013).

When the application for a change of venue was filed, along with two supporting affidavits stating that the defendant was unable to receive a fair trial in a particular area due to the publicity surrounding the case, a presumption arose that an impartial jury was unattainable, Miss. Code Ann. § 99-15-35 (Rev. 2007); however, the State can rebut such a presumption by proving from voir dire that the trial court impaneled an impartial jury. Barfield v. State, 22 So. 3d 1175, 2009 Miss. LEXIS 583 (Miss. 2009).

In a murder case, defendant's right to a fair trial was not fundamentally compromised by the trial court's denial of defendant's motion for change of venue, and the trial court did not abuse its discretion in failing to grant defendant's motion; although defendant argued that several jurors knew the victim or members of his family, defendant had ample opportunity to question members of the venire panel and to use both his peremptory challenges and challenges for cause. Stewart v. State, 29 So. 3d 12, 2008 Miss. App. LEXIS 400

(Miss. Ct. App. 2008), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 106 (Miss. 2010).

Denial of defendant's motion for a change of venue in his criminal trial was appropriate because defendant had ample opportunity to question members of the venire and to use both his peremptory challenges and challenges for cause. Conner v. State, 971 So. 2d 630, 2007 Miss. App. LEXIS 370 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 682 (Miss. 2007).

If state shows impartial jury was impaneled, Supreme Court defers to trial court's denial of change of venue request, even in face of adverse publicity, for venue decision is within discretion of lower court. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. Hickson v. State, 707 So. 2d 536, 1997 Miss. LEXIS 734 (Miss. 1997).

Supreme Court reviews trial court's ruling on motion to change venue in criminal proceeding under an abuse of discretion standard. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

When defendant alleges that he cannot obtain impartial jury without change of venue, lower court's decision to deny such motion is within trial judge's sound discretion; decision of lower court will not be overturned if that discretion has not been abused. Morgan v. State, 681 So. 2d 82, 1996 Miss. LEXIS 429 (Miss. 1996).

Denial of defendant's motion for change of venue was not abuse of discretion, where upon questioning, during voir dire, some of prospective jurors stated that they had heard about the case, but none stated that they had heard, read or otherwise acquired knowledge of the case that would affect how he or she might view the evidence. Cabello v. State, 490 So. 2d 852, 1986 Miss. LEXIS 2479 (Miss. 1986).

Where the entire record in a murder case, viewed from its conclusion and as an entirety, showed that the defendant has had a fair and impartial trial, free from bias and prejudice, the defendant has no right to complain because he was denied a change of venue. Thompson v. State, 231 Miss. 624, 97 So. 2d 227, 1957 Miss. LEXIS 546 (Miss. 1957).

Granting of change of venue is so largely in discretion of trial court that a judgment or conviction will not be reversed on appeal, on ground that a change of venue was refused, unless it clearly appears that the trial court abused its discretion. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

In determining whether trial court abused its discretion in denying motion for change of venue, supreme court will consider the voir dire examination of prospective jurors, the result of the effort to obtain a trial jury, and the evidence on the merits of the case. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

In testing the fairness or bias of the jurors to determine whether trial court abused its discretion in denying motion for change of venue, supreme court may look to the verdict reached viewed in the light of the evidence on the merits as a completed trial. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

The supreme court will review all the evidence where refusal to grant change of venue is properly assigned. Bond v. State, 128 Miss. 792, 91 So. 461, 1922 Miss. LEXIS 167 (Miss. 1922).

Unless there has been an abuse of discretion by the circuit court, the supreme court will not reverse for a refusal to grant a change of venue. Stewart v. State, 50 Miss. 587, 1874 Miss. LEXIS 97 (Miss. 1874); Bishop v. State, 62 Miss. 289, 1884 Miss. LEXIS 72 (Miss. 1884); Regan v. State, 87 Miss. 422, 39 So. 1002, 1905 Miss. LEXIS 149 (Miss. 1905); Dalton v. State, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925).

5. Particular circumstances.

Defendant was not entitled to a change of venue pursuant to Miss. Code Ann. § 99-15-35 because the record lacked any persuasive evidence of "inordinate" media coverage; defendant produced only two online news articles, and each of the five veniremen called by the State denied any familiarity with the details of the allegations against defendant, each had never discussed the case or heard it discussed, and each believed defendant could receive a fair trial in the county. Slade v. State, 42 So. 3d 25, 2009 Miss. App. LEXIS 640 (Miss. Ct. App. 2009).

Defendant's motion for a change of venue was not in writing, was not supported by the affidavits of two or more credible persons, and was therefore procedurally barred under Miss. Code Ann. § 99-15-35; in addition, the trial court found that the allegations of judicial bias were unfounded, that the sheriff's department had not been uncooperative, that third-hand evidence of threats against one of defendant's witnesses was inadmissible hearsay, and that the jury had affirmed during voir dire testimony that media coverage of defendant's trial would not affect their impartiality. Mingo v. State, 944 So. 2d 18, 2006 Miss. LEXIS 679 (Miss. 2006).

In a capital murder case, the trial court did not err in not granting defendant a change of venue where no motion for change of venue appeared in the record, defendant failed to demonstrate that she was prejudiced by the denial of her "motion," and there was no evidence demonstrating that the failure to move the trial to another county was prejudicial to defendant. Byrom v. State, 863 So. 2d 836, 2003 Miss. LEXIS 535 (Miss. 2003), cert. denied, 543 U.S. 826, 125 S. Ct. 71, 160 L. Ed. 2d 40, 2004 U.S. LEXIS 5754 (U.S. 2004).

As the State produced evidence that a fair and impartial jury was actually selected, the venire members having not responded to inquiries from the trial court as to whether they had heard or read anything about the case that would prevent them from being fair and impartial, defendant did not meet his burden of showing that the trial judge abused his discretion when he overruled defendant's motion for change of venue. Nichols v. State, 868 So. 2d 355, 2003 Miss. App. LEXIS 682 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 255 (Miss. 2004).

The trial court did not err in denying the defendant's motion for a change of venue since, while a number of jurors had "heard" of the case, none of the responses to the voir dire questions showed any bias or prejudice toward the defendant's innocence or guilt and nothing in the record evinced any passion or outrage toward the defendant. Gulley v. State, 779 So. 2d 1140, 2001 Miss. App. LEXIS 6 (Miss. Ct. App. 2001).

In a murder prosecution, the court did not err when it first transferred venue to another county and then amended the order to transfer venue only for the limited purpose of selecting jurors, retaining the actual trial of the matter for reasons of practicality. Brown v. State, 749 So. 2d 82, 1999 Miss. LEXIS 344 (Miss. 1999).

The judge did not abuse his discretion in selecting the county for the defendant's murder prosecution and the defendant was not entitled to a change of venue where (1) coverage of the defendant's crime in the chosen county was much less extensive than in other areas of the state, and (2) although some jurors read newspaper articles about the trial, all stated that they could be fair and impartial. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

Trial court had authority, in highly publicized prosecution for murder of black leader of civil rights organization, to transfer venue for trial purposes to county which had more accommodating facilities and large law enforcement contingent to provide proper security. De La Beckwith v. State, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Defendant failed to properly support his motion to change venue, where defendant did not provide trial court with any affidavits swearing that he could not receive fair and impartial trial. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

By attaching to motion for change of venue five form affidavits indicating that affiants thought that defendant could not get fair trial in county due to ill will toward defendant, defendant successfully raised rebuttable presumption to demonstrate that impartial jury could not be impaneled. Morgan v. State, 681 So. 2d 82, 1996 Miss. LEXIS 429 (Miss. 1996).

Murder defendant was not entitled to change of venue; none of the 12 jurors who served on defendant's case indicated that they had read about defendant's case or formed opinion one way or the other about his innocence vel non, witnesses in hearing on motion for change of venue, save one, testified that there had not been a lot of discussion about case, and all save one indicated that they were aware of no ill will or malice harbored by residents of county toward defendant. Morgan v. State, 681 So. 2d 82, 1996 Miss. LEXIS 429 (Miss. 1996).

A trial court did not abuse its discretion in denying a defendant's motion for change of venue, which was primarily based on extensive publicity prior to trial, even though evidence otherwise inadmissible was contained in published reports of the crime and the victim was a prominent person in the county, where the state presented 11 witnesses who testified that they were familiar with the county and its residents, that there was no prejudice against the defendant, and that in their opinions the defendant could receive a fair trial, while the defendant presented one witness who testified on cross-examination that he felt the publicity had not so saturated the community that the defendant could not receive a fair trial, and presented 2 other witnesses, who were related to the defendant by marriage, who testified that the defendant could not obtain a fair trial but did not testify to familiarity with the county and its residents. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

Publicity associating a defendant with 3 robberies and 3 rapes was insufficient to entitle him to a change of venue for his trial for rape where the publicity consisted of 4 newspaper articles, 3 of which appeared on the front page, and 6 months of silence intervened between the publicity and the trial. McKinney v. State, 521 So. 2d 898, 1988 Miss. LEXIS 112 (Miss. 1988), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497, 1990 U.S. LEXIS 1182 (U.S. 1990).

A defendant waived his right to a change of venue where he filed a motion for change of venue with 2 supporting affidavits prior to selection of the jury but did not call the motion to the trial court's attention and did not request a hearing on the motion until after completion of voir dire, after selection of the jury, and after both sides had announced their readiness for trial. Wash v. State, 521 So. 2d 890, 1988 Miss. LEXIS 115 (Miss. 1988), overruled, Wharton v. State, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

Trial court did not commit error in refusing to grant defendant's motion for change of venue where motion was filed along with 4 affidavits stating that defendant could not obtain fair trial in county, because at hearing on motion, 4 witnesses testified they had heard some talk about case, one admitted he had not heard anything for a month or two, 5 witnesses testified for state and 4 of them testified they had spoken to hundreds of people throughout county and had heard no expressions about case one way or other, and fifth, editor of newspaper, testified that newspaper publicity on case amounted to short piece in one edition and short paragraph in another. Burney v. State, 515 So. 2d 1154, 1987 Miss. LEXIS 2905 (Miss. 1987), but see McCarty v. State, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

It was not error for Circuit Court to refuse to order change of venue despite testimony by county tax assessor admitting that rape of 76-year-old white female by 24-year-old black male could well be type of case that would subject accused to unfair trial by partial jury, and testimony of newspaper owner and editor that such crime would be volatile sort of thing that people would have strong feelings about. Johnson v. State, 511 So. 2d 1360, 1987 Miss. LEXIS 2667 (Miss. 1987).

Where sixty-five per cent of jurors examined to try defendant accused of murder say that they either have fixed opinions which cannot be changed by evidence or that they are so biased or prejudiced against him that they cannot give him a fair trial, it is impossible for accused to obtain fair and impartial trial in county and motion for change of venue should be granted. Seals v. State, 208 Miss. 236, 44 So. 2d 61, 1950 Miss. LEXIS 242 (Miss. 1950).

Denial of motions for change of venue in homicide prosecution were without prejudice to accused where testimony of witnesses from all parts of county supported contention that accused could get a fair and impartial trial, and no special precautions were needed or taken; and fact that seven out of the first twenty-one jurors called were disqualified because of fixed opinions did not imply any purpose inconsistent with a guaranty of a fair and unbiased jury, particularly in view of the fact that defendant only exercised eight of his twelve peremptory challenges. Patton v. State, 207 Miss. 120, 40 So. 2d 592, 1949 Miss. LEXIS 322 (Miss.), cert. denied, 338 U.S. 855, 70 S. Ct. 104, 94 L. Ed. 523, 1949 U.S. LEXIS 1796 (U.S. 1949).

Request for change of venue held properly denied within discretion of court at third trial of defendant for rape some two and one-half years after alleged offense where defendant's safety was not in jeopardy and many witnesses testified a fair trial could be had notwithstanding at the time of alleged offense state militia was called to protect the defendant. McGee v. State, 40 So. 2d 160 (Miss.), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487, 1949 U.S. LEXIS 1886 (U.S. 1949).

A prima facie case for change of venue is made out where it is shown that the public is so aroused against the accused that it was necessary to call out the militia or otherwise protect him from violence or to remove him from the county. McGee v. State, 200 Miss. 350, 26 So. 2d 680, 1946 Miss. LEXIS 298 (Miss. 1946).

Trial court did not abuse its discretion in denying motion for change of venue in prosecution for murder of popular former sheriff, wherein defendants, who were from out of state, were convicted and death sentence imposed, in view of the effort to obtain an unbiased jury and the evidence on the merits of the case, and where twelve citizens of the county testified positively that they knew of no reason why an unbiased jury could not be secured and a fair trial had, notwithstanding that defendants' counsel made charges, supported by affidavits, that they had talked with a number of citizens of the county and the feeling was general that defendants were guilty and should receive the death sentence. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

Where one is indicted in the same county for two offenses and is entitled to a change of venue for one under this section [Code 1942, § 2508], he should be granted a change as to the other, if the connection between the offenses is such that the prejudgment, grudge or ill will which entitled him to the change granted in one operates adversely to him in the other case although the crime charged in the other case did not produce such prejudgment. Owens v. State, 82 Miss. 31, 33 So. 722, 1903 Miss. LEXIS 106 (Miss. 1903).

Instances of improper refusal of application for change of venue. Tennison v. State, 79 Miss. 708, 31 So. 421, 1901 Miss. LEXIS 121 (Miss. 1901); Brown v. State, 83 Miss. 645, 36 So. 73, 1903 Miss. LEXIS 85 (Miss. 1903); Magness v. State, 103 Miss. 30, 60 So. 8, 1912 Miss. LEXIS 136 (Miss. 1912).

6. Publicity.

Circuit court did not abuse its discretion in denying defendant's motion for change of venue based on the news coverage of the murder because the story had not been covered in the media at all since the initial incident, two years prior to the venue hearing. Hall v. State, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

Of the articles submitted by defendant, where only three articles dated from 1998 identified the race of defendant, but none of which identified the race of the victim, the articles did not constitute an inordinate amount of media coverage; also, no venire member responded to the trial court's question that he or she had read, heard, or seen anything regarding the case, and thus the trial court did not abuse its discretion in denying defendant's motion for a change of venue. King v. State, 960 So. 2d 413, 2007 Miss. LEXIS 317 (Miss. 2007), cert. denied, 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244 (U.S. 2008).

In light of the scant amount of media coverage combined with the defendant's failure to submit the requisite affidavits of two or more credible persons as support for his motion for change of venue until the day of trial and after the jury pool had been called and seated, the evidence did not cast a cloud upon the defendant's right to a fair trial before an impartial jury. Conner v. State, 726 So. 2d 1238, 1998 Miss. App. LEXIS 1082 (Miss. Ct. App. 1998).

Pretrial publicity about sexual battery of church secretary in pastor's office of church in small town entitled defendant to change of venue, even though jurors stated that they could be fair and impartial; 11 jurors had read or watched media coverage of case, that coverage recounted another sexual battery charge against defendant, juror asked about this incident in deliberations, scientific evidence did not conclusively show guilt for rape, and case turned on credibility of witnesses. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. Hickson v. State, 707 So. 2d 536, 1997 Miss. LEXIS 734 (Miss. 1997).

Denial of defendant's motion for change of venue for resentencing in capital case was not abuse of discretion; there had been period of several years without newspaper or television coverage of case, and of six venirepersons who stated they had prior knowledge of case, those who stated their knowledge would affect verdict were removed and those two who remained stated their knowledge would not bar them from serving impartially. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Two factors are evaluated in determining whether trial court abused its discretion in denying motion to change venue in criminal proceeding; level of adverse publicity, both in extent of coverage and its inflammatory nature, and the extent of the effect the publicity had upon venire persons in case. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

7. Fair trial.

Circuit court did not err by determining whether a fair and impartial jury could be impaneled before making a determination with regard to venue because defendant failed to provide a sufficient basis for his motion for change of venue, and voir dire ultimately amassed an adequate cross-section of fair and impartial jurors for impanelment. Hall v. State, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

Trial judge properly denied defendant's motion for change of venue because it was procedurally barred, as it did not conform with the requirements set forth in this statute, specifically, defendant failed to swear to the petition for change of venue; and, procedural bar notwithstanding, the trial judge considered the evidence presented and concluded that defendant was able to have a fair and impartial trial in Panola County as there had been little publicity in 2012 regarding the setting aside of defendant's guilty plea and sentence; and there had been an in-depth voir dire of jurors during jury selection. Clark v. State, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

Defendant's conviction for the sale of cocaine was appropriate because the denial of her motion for a change of venue was correct since none of the venire persons indicated to the trial judge that they would have had difficulty in granting defendant a fair trial. Based on the questions asked by the trial judge and the lack of any affirmative responses thereto, an impartial was impaneled and a change of venue was not warranted. Simmons v. State, 13 So. 3d 844, 2009 Miss. App. LEXIS 471 (Miss. Ct. App. 2009).

Defendant's motion for change of venue was properly denied because there was no evidence in the record to indicate that the jurors were not fair and impartial; the trial judge took appropriate steps, through voir dire, jury instruction, and sequestration, to ensure that defendant's right to a fair trial was preserved. Welde v. State, 3 So. 3d 113, 2009 Miss. LEXIS 70 (Miss. 2009).

Petitioner was denied post-conviction relief from her capital murder conviction and death sentence based on her claim of ineffective assistance of counsel due to her counsel's failure to actively pursue a change of venue, because the court had considered the issue of counsel's pursuit of a change of venue on direct appeal and found no motion for change of venue in the record; there was no indication that such a motion had been presented to the trial judge or ruled on, and there was no evidence in the record, nor was it demonstrated by petitioner in her brief, that the failure to move her trial to another county was prejudicial to her case. Although petitioner's claim was procedurally barred, the court considered the issue and found that petitioner failed to make a satisfactory showing that she did not receive a fair and impartial trial in the county where the offense was charged as required by Miss. Code Ann. § 99-15-35; the trial judge took steps, suggested and condoned by petitioner's counsel, to preserve the jury's impartiality. Byrom v. State, 927 So. 2d 709, 2006 Miss. LEXIS 43 (Miss.), cert. denied, 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076 (U.S. 2006).

Defendant failed to show that his trial counsel's performance was deficient on the issue of seeking a change of venue of his capital murder trial, pursuant to Miss. Code Ann. § 99-15-35, as no one in the community agreed to sign an affidavit to support the change of venue motion, four newspaper articles had been entered into evidence, of 10 witnesses who were randomly selected from the jury pool, nine indicated that they felt that defendant would get a fair trial in the present county, and defendant did not offer any proof that there was available evidence or testimony not admitted by defense counsel during the hearing. Grayson v. State, 879 So. 2d 1008, 2004 Miss. LEXIS 721 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593 (U.S. 2005).

Where defendant presents court with application for change of venue accompanied by two affidavits which affirm defendant's inability to receive fair trial in particular location, presumption is created that it is impossible for fair trial in that place. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. Hickson v. State, 707 So. 2d 536, 1997 Miss. LEXIS 734 (Miss. 1997).

Presumption that defendant cannot receive fair trial, but needs change of venue, may be rebutted if state proves from voir dire that trial court impaneled impartial jury. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. Hickson v. State, 707 So. 2d 536, 1997 Miss. LEXIS 734 (Miss. 1997).

Presumption of inability to conduct fair trial in a venue arises with an application for change of venue supported by two affidavits affirming defendant's inability to receive fair trial. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

State can rebut presumption of inability to conduct fair trial in original venue by proving from voir dire that trial court impaneled an impartial jury; if state demonstrates such, Supreme Court will not overturn trial court's finding that an impartial jury could be found, despite adverse publicity. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

8. Discretion.

Although venue issue is committed to trial judge's sound discretion, it is not left up to his unfettered discretion; the discretion must be informed by evidence presented at venue hearing coupled with trial judge's reasoned application of sense of community and awareness of impact of saturation media publicity upon attitudes of community. (Per Justice Banks with the Chief Justice, a presiding Justice, and one Justice concurring and one presiding Justice concurring in result. Hickson v. State, 707 So. 2d 536, 1997 Miss. LEXIS 734 (Miss. 1997).

9. Rebuttal of presumption.

Because the State rebutted the presumption of unfairness in this section through an agreed-upon mock voir dire, demonstrating an impartial jury could be drawn from Harrison County, the trial judge did not abuse her discretion by denying defendant's motion to change venue. Garcia v. State, 300 So. 3d 945, 2020 Miss. LEXIS 131 (Miss. 2020).

RESEARCH REFERENCES

ALR.

Right of prosecution to writ of certiorari in criminal case. 91 A.L.R.2d 1095.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 34 A.L.R.3d 804.

Change of venue by state in criminal case. 46 A.L.R.3d 295.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes. 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis. 74 A.L.R.4th 388.

Power of state trial court in criminal case to change venue on its own motion. 74 A.L.R.4th 1023.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 477 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 151 et seq. (venue).

1 Am. Jur. Trials, Controlling Trial Publicity, § 32.

CJS.

22 C.J.S., Criminal Law §§ 239 et seq.

§ 99-15-37. Change of venue; transfer of records to removal court.

Upon the order being made changing the venue in a criminal case, the clerk shall make out a transcript of the caption of the record, also of the proceedings impaneling the grand jury, of the indictment, with the entries or indorsements thereon, and all entries relative thereto in the records of his office, of the bonds and recognizances of the defendant, of the names of all the witnesses, and of all orders, judgments, or other papers or proceedings belonging to or had in said cause and attach his certificate thereto, under his hand, with the seal of the court annexed, and forward it, sealed up, by a special messenger, or deliver it himself, together with all the original subpoenas in the case, to the clerk of the circuit court to which the trial is ordered to be removed.

HISTORY: Codes, 1857, ch. 64, art. 299; 1871, § 2763; 1880, § 2062; 1892, § 1412; 1906, § 1485; Hemingway's 1917, § 1243; 1930, § 1266; 1942, § 2509.

Cross References — On change of venue, defendant to be tried on copy of indictment, see § 99-15-39.

Correcting errors in the record, see § 99-15-41.

Change of venue in capital cases, see § 99-15-43.

Severance of joint indictments in felony cases, see § 99-15-47.

JUDICIAL DECISIONS

1. In general.

A defendant waived his claim that he was improperly tried in a new venue because a certified copy of his indictment had never been transmitted to the new venue, where the defendant did not assert this claim prior to trial; alternatively, the circuit court cured any error under the authority of § 99-15-41. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

The presumption that the clerk of the circuit court where the original indictment was found did his duty under this section [Code 1942, § 2509] is not overcome by the testimony of the clerk of the circuit court to which the venue is changed that he had received the transcript by mail. McDonald v. State, 78 Miss. 369, 29 So. 171, 1900 Miss. LEXIS 143 (Miss. 1900).

RESEARCH REFERENCES

ALR.

Power or duty of prosecuting attorney to proceed with prosecution after change of venue. 60 A.L.R.2d 864.

Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstituted. 85 A.L.R.2d 993.

§ 99-15-39. Change of venue; defendant to be tried on copy of indictment; specific objections to defects in transcript required.

The defendant, on a change of venue, shall be tried on the copy of the indictment so certified; and the record, proceedings, and papers therein copied and certified, shall, in all respects become, be received, read, and taken as the original record, papers and proceedings in the said cause, and shall have the same force and effect. Defects in the transcript shall not avail the accused if he do not object to them specifically before trial.

HISTORY: Codes, 1857, ch. 64, art. 300; 1871, § 2764; 1880, § 3063; 1892, § 1413; 1906, § 1586; Hemingway's 1917, § 1244; 1930, § 1267; 1942, § 2510.

Cross References — Transfer of records to removal court, see § 99-15-37.
Correcting errors in the record, see § 99-15-41.

JUDICIAL DECISIONS

1. In general.

A defendant waived his claim that he was improperly tried in a new venue because a certified copy of his indictment had never been transmitted to the new venue, where the defendant did not assert this claim prior to trial; alternatively, the circuit court cured any error under the authority of § 99-15-41. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

The copy of the indictment transmitted must show the indorsement of "filed," which is made by statute evidence of its finding and return. Williamson v. State, 64 Miss. 229, 1 So. 171, 1886 Miss. LEXIS 50 (Miss. 1886).

The court to which the venue is changed must try the accused not on the original indictment but upon a certified copy. Browning v. State, 30 Miss. 656, 1856 Miss. LEXIS 16 (Miss. 1856); Browning v. State, 33 Miss. 47, 1856 Miss. LEXIS 234 (Miss. 1856); Williamson v. State, 64 Miss. 229, 1 So. 171, 1886 Miss. LEXIS 50 (Miss. 1886).

The record transmitted must appear to be a record of the proceedings upon the indictment on which the prisoner is tried. Jenkins v. State, 30 Miss. 408, 1855 Miss. LEXIS 107 (Miss. 1855).

§ 99-15-41. Change of venue; correcting errors in record.

On suggestion to the court, with satisfactory showing, it may order a more perfect record to be made and certified, or direct the clerk making the same to rectify any errors therein.

HISTORY: Codes, 1857, ch. 64, art. 301; 1871, ch. 2765; 1880, § 3064; 1892, § 1414; 1906, § 1487; Hemingway's 1917, § 1245; 1930, § 1268; 1942, § 2511.

JUDICIAL DECISIONS

1. In general.

A defendant waived his claim that he was improperly tried in a new venue because a certified copy of his indictment had never been transmitted to the new venue, where the defendant did not assert this claim prior to trial; alternatively, the circuit court cured any error under the authority of this section. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

§ 99-15-43. Change of venue; capital cases.

In capital cases the application for change of venue must be made before the drawing of any special venire which is summoned to appear on the day the case is set for trial, or it will be too late, except where the ground on which such application is based occurred after the drawing of such venire.

HISTORY: Codes, 1880, § 3065; 1892, § 1415; 1906, § 1488; Hemingway's 1917, § 1246; 1930, § 1269; 1942, § 2512; Laws, 1985, ch. 443, § 4, eff from and after July 1, 1985.

Cross References — Showing of need and grounds for change of venue generally, see § 99-15-35.

Severance of joint indictments in felony cases, see § 99-15-47.

JUDICIAL DECISIONS

1. In general.

In the trial of a capital murder charge, there was no error in denial of a change of venue where the trial judge found after voir dire of the jury that the panel represented a cross-section of the county and that, based upon the prospective jurors' responses, a fair jury could be drawn. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In a murder prosecution, the court properly overruled defendant's motion for a change of venue, which was made after the special venire had been summoned and while the jury was being impaneled to try the defendant, and which was not supported by the affidavits of two or more credible persons. Thompson v. State, 231 Miss. 624, 97 So. 2d 227, 1957 Miss. LEXIS 546 (Miss. 1957).

Under this section [Code 1942, § 2512] an application for a change of venue is not too late if it is made after the quash of the venire but before the writ of another is issued. Purvis v. State, 71 Miss. 706, 14 So. 268 (Miss. 1893).

RESEARCH REFERENCES

ALR.

Power of state trial court in criminal case to change venue on its own motion. 74 A.L.R.4th 1023.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

§ 99-15-45. Change of venue; costs paid by county from which venue is changed.

The county from which the venue is changed shall pay the costs and expenses incident to such change and trial in another county as if such change of venue had not been made.

HISTORY: Codes, 1880, § 3066; 1892, § 1416; 1906, § 1489; Hemingway's 1917, § 1247; 1930, § 1270; 1942, § 2513.

§ 99-15-47. Joint indictments; severance in felonies.

Any of several persons jointly indicted for a felony may be tried separately on making application therefor, in capital cases, before the drawing of any special venire which is summoned to appear on the day the case is set for trial and in other cases, before arraignment.

HISTORY: Codes, 1880, § 3068; 1892, § 1417; 1906, § 1490; Hemingway's 1917, § 1248; 1930, § 1271; 1942, § 2514, Laws, 1985, ch. 443, § 5, eff from and after July 1, 1985.

Cross References — Change of venue in capital cases, see § 99-15-43.

Severance of joint indictments in misdemeanors, see § 99-15-49.

Joint defendants, tried separately, are competent witnesses for one another, see § 99-17-17.

Joint indictments, see MRCrP 14.2.

Severance of offenses and defendants, see MRCrP 14.3.

Arraignment of defendants who are jointly charged, see MRCrP 15.1.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. When made.

1. In general.

Trial court's refusal to sever defendants was not an abuse of discretion, as there was no showing either defendant was prejudiced by the denial of the severance: neither sought exculpation at the expense of the other; the evidence, except as to a bite mark that implicated the first defendant, went to the guilt of both defendants; and other evidence did not exclude the second defendant from causing any of the victim's other injuries. Stubbs v. State, 845 So. 2d 656, 2003 Miss. LEXIS 115 (Miss. 2003).

The statute does not require that persons jointly indicted for capital murder, where the state intends to seek the death penalty, must be tried separately. Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

Nothing in the statute requires that persons jointly indicted for capital murder, where the state intends to seek the death penalty, must be tried separately; the statute only provides that co-indictees may be tried separately, at the trial court's discretion, when a motion for severance is timely filed. Smith v. State, 724 So. 2d 280, 1998 Miss. LEXIS 589 (Miss. 1998).

A trial court erred in refusing to grant a defendant's request for a severance where the evidence offered by the State implicated both the defendant and the codefendant equally in the commission of the crime, and the testimony of both of them tended to exculpate themselves at the expense of the other; if a severance had been granted, the jury would have been able to consider the defendant's defense in light of the State's evidence without first comparing it to the codefendant's defense to make sure the defenses were consistent, and a separate trial would ensure that the defendant was convicted solely on the basis of the State's evidence and not because he and the codefendant had inconsistent defenses. Tillman v. State, 606 So. 2d 1103, 1992 Miss. LEXIS 533 (Miss. 1992), overruled in part, White v. State, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

Whether or not 2 defendants' statements given to officers were in conflict is not the test in deciding whether an attorney has a conflict of interest in representing the 2 defendants. The test is whether their defenses are in conflict with each other. This is important in determining both whether their trials should be severed and whether or not the attorney is placed in an unethical position in having to represent them both. Carol v. State, 540 So. 2d 1330, 1989 Miss. LEXIS 166 (Miss. 1989).

The criteria to be used to determine if the denial of a motion for severance is proper are whether or not the testimony of one co-defendant tends to exculpate him or herself at the expense of the other defendant and whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. Hawkins v. State, 538 So. 2d 1204, 1989 Miss. LEXIS 91 (Miss. 1989).

Where the testimony of co-defendants is adverse, it is reversible error for the circuit judge to overrule a motion for severance, timely made. Rigby v. State, 485 So. 2d 1060, 1986 Miss. LEXIS 2785 (Miss. 1986).

A directed verdict of acquittal as to other co-defendants dissipated harm to the remaining defendant resulting from judge's error in refusing to grant severance. Rigby v. State, 485 So. 2d 1060, 1986 Miss. LEXIS 2785 (Miss. 1986).

Trial court may refuse to grant motion for severance filed by defendant in prosecution for robbery with deadly weapon where there does not appear to be conflict of interest among codefendant and evidence introduced at trial does not go more to guilt of one defendant than to other. Duckworth v. State, 477 So. 2d 935, 1985 Miss. LEXIS 2455 (Miss. 1985).

In prosecution of the parents for the capital murder of their child, the trial court did not abuse its discretion in denying the defendants' motion for severance made pursuant to this section. Cardwell v. State, 461 So. 2d 754, 1984 Miss. LEXIS 2060 (Miss. 1984).

Whether a severance should be granted pursuant to this section is addressed to the discretion of the trial judge. Price v. State, 336 So. 2d 1311, 1976 Miss. LEXIS 1557 (Miss. 1976).

Since a right to a separate trial does not give defendants a corresponding right to be tried jointly, and the court in its discretion may order separate trials over an objection that defendants should be tried together, the trial court did not err in trying separately a defendant who had been jointly indicted with another for murder. Thompson v. State, 231 Miss. 624, 97 So. 2d 227, 1957 Miss. LEXIS 546 (Miss. 1957).

In the prosecution of several defendants for grand larceny of tung nuts, although the defendants had a right to severance by applying for it before arraignment, under this section [Code 1942, § 2514] the granting of severance was discretionary with the trial court where application was made after the arraignment. Dueitt v. State, 225 Miss. 254, 83 So. 2d 91, 1955 Miss. LEXIS 579 (Miss. 1955).

In case where several defendants jointly indicted are granted a severance but are thereafter tried jointly on the indictment without objection on their part they waive their right to a separate trial. Wellborn v. State, 140 Miss. 640, 105 So. 769, 1925 Miss. LEXIS 300 (Miss. 1925).

This section [Code 1942, § 2514], if severance be seasonably applied for, does not otherwise change the common law. Malone v. State, 77 Miss. 812, 26 So. 968, 1900 Miss. LEXIS 3 (Miss. 1900).

2. When made.

It was within the trial court's discretion as to whether severance should be granted where the record did not indicate that the right to move for severance had been reserved prior to arraignment. Rooks v. State, 529 So. 2d 546, 1988 Miss. LEXIS 232 (Miss. 1988).

Sustaining a motion for severance, even though it is timely made, is ordinarily discretionary with the circuit judge in all criminal trials, except death penalty cases. Rigby v. State, 485 So. 2d 1060, 1986 Miss. LEXIS 2785 (Miss. 1986).

Motion for severance which is not brought to court's attention before state has announced ready for trial on date set for trial is properly denied. Minor v. State, 482 So. 2d 1107, 1986 Miss. LEXIS 2352 (Miss. 1986).

In a prosecution for armed robbery the trial court did not abuse its discretion in denying defendant's motion for a severance during the middle of the trial, where defendant's attorney testified that he elected to have codefendants tried together as part of his trial strategy despite his pretrial knowledge of the potential conflict of interest between the codefendants. Hicks v. State, 419 So. 2d 215, 1982 Miss. LEXIS 2141 (Miss. 1982).

In a prosecution for burglary in which defendants were jointly tried and convicted, the trial court did not err in overruling defendants' motion for severance where the motion, made over four months after trial and one month after the trial record was filed in the Supreme Court, was patently untimely. Usry v. State, 378 So. 2d 635, 1979 Miss. LEXIS 2540 (Miss. 1979).

It was within the discretion of the trial court to refuse to grant a motion for severance by defendant jointly indicated for burglary, and it did not abuse that discretion in denying defendant's motion, which was not filed until one day before the case was set for trial. Ivory v. State, 336 So. 2d 732, 1976 Miss. LEXIS 1518 (Miss. 1976).

Where an application for severance is made after arraignment of defendant, charged with assault and battery with intent to kill, the granting of a severance is discretionary with the trial court. Bolin v. State, 209 Miss. 866, 48 So. 2d 581, 1950 Miss. LEXIS 452 (Miss. 1950).

Assignment of error cannot be considered on bills of exception signed and filed five months after trial and two months after record filed in supreme court, where failure to grant a severance is complained of. Davis v. State, 144 Miss. 551, 110 So. 447, 1926 Miss. LEXIS 414 (Miss. 1926).

RESEARCH REFERENCES

ALR.

Right to severance where codefendant has incriminated himself. 54 A.L.R.2d 830.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 A.L.R.3d 245.

Rights of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases - State Narcotics Offenses. 19 A.L.R.6th 115.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in State Homicide Offenses - Applicable Standard and Extent of Antagonism Required. 24 A.L.R. 6th 591.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 196 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Crimi-

nal Procedure, Forms 321, 322 (severance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 53 et seq.

CJS.

23 C.J.S., Criminal Law §§ 804, 806.

42 C.J.S., Indictments and Informations §§ 189 et seq.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

1983 Mississippi Supreme Court Review: Severance of joint trials. 54 Miss L. J. 139, March, 1984.

§ 99-15-49. Joint indictments; severance in misdemeanors.

Persons jointly indicted for misdemeanors may be tried jointly or separately, in the discretion of the court.

HISTORY: Codes, 1880, § 3069; 1892, § 1418; 1906, § 1491; Hemingway's 1917, § 1249; 1930, § 1272; 1942, § 2515.

Cross References — Severance of joint indictments in felony cases, see § 99-15-47.
Joint indictments, see MRCrP 14.2.
Severance of offenses and defendants, see MRCrP 14.3.

JUDICIAL DECISIONS

1. In general.

Supreme court would not interfere with trial court's discretion in overruling motion for severance made by seven defendants charged with being interested in gambling table. Boyd v. State, 177 Miss. 34, 170 So. 671, 1936 Miss. LEXIS 247 (Miss. 1936).

RESEARCH REFERENCES

ALR.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 A.L.R.3d 245.

Rights of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases - State Narcotics Offenses. 19 A.L.R.6th 115.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in State Homicide Offenses - Applicable Standard and Extent of Antagonism Required. 24 A.L.R. 6th 591.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 196 et seq.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 321, 322 (severance).

5 Am. Jur. Trials, Pretrial Procedures and Motions, §§ 53 et seq.

CJS.

23 C.J.S., Criminal Law §§ 804, 806 et seq.

42 C.J.S., Indictments and Informations §§ 187 et seq.

§ 99-15-51. Dismissal of petty misdemeanor charge upon satisfaction of injured party.

In prosecutions for petty misdemeanors, if the party injured appear before the court where the same shall be pending and acknowledge to have received satisfaction, on motion of the prosecuting attorney the court, if it shall adjudge that the ends of justice will be conserved thereby, may discharge the defendant and dismiss the proceedings and may require the payment of court costs.

HISTORY: Codes, 1857, ch. 64, art. 360; 1871, § 2868; 1880, § 3102; 1892, § 1457; 1906, § 1530; Hemingway's 1917, § 1292; 1930, § 1317; 1942, § 2565; Laws, 1988, ch. 415, § 1; Laws, 1990, ch. 316, § 1, eff from and after July 1, 1990.

Cross References — Trial where it appears accused is only guilty of misdemeanor, see § 99-15-55.

Expunction of misdemeanor charges, see § 99-15-59.

Plea discussions, see MRCrP 15.2 through 15.4.

JUDICIAL DECISIONS

1. In general.

In a suit for damages on a charge of malicious prosecution, the question as to whether the plaintiff had authorized or subsequently ratified another person's compromise and settlement of the prosecution, while the plaintiff was in jail, was for the jury. Brown v. Kisner, 192 Miss. 746, 6 So. 2d 611, 1942 Miss. LEXIS 48 (Miss. 1942).

OPINIONS OF THE ATTORNEY GENERAL

"Remanded to the File" is not a statutory disposition of a case, and since this is not a statutory dismissal, no costs should be imposed against the defendant. Reed, Nov. 13, 1991, A.G. Op. #91-0776.

Court may dismiss prosecution of misdemeanor on motion of prosecuting attorney. Cooke, Dec. 17, 1992, A.G. Op. #92-0858.

Misdemeanor affidavit, including traffic ticket, can only be dismissed in accordance with Miss. Code Section 99-15-51 which provides that court may dismiss prosecution of misdemeanor on motion of prosecuting attorney. Miller, Mar. 3, 1993, A.G. Op. #93-0099.

A defendant may be required to pay court cost for a petty misdemeanor case that is dismissed at the request of the victim; however, a defendant charged with a felony may not be required to pay the court costs upon dismissal of the charge. Pacific, November 25, 1998, A.G. Op. #98-0718.

There is no authority for a justice court to charge a "drop fee" for a case to be dismissed; however, costs under the statute should be charged against the defendant. Barnett, May 19, 2000, A.G. Op. #2000-0272.

RESEARCH REFERENCES

ALR.

Construction and effect of statute authorizing dismissal of criminal action upon settlement of civil liability growing out of act charged. 42 A.L.R.3d 315.

§ 99-15-53. Prosecutions not compromised or nol prossed without consent of court, or dismissed, except at defendant's cost.

A district attorney, or other prosecuting attorney, shall not compromise any cause or enter a nolle prosequi either before or after indictment found, without the consent of the court; and, except as provided in the last preceding section, it shall not be lawful for any court to dismiss a criminal prosecution at the cost of the defendant, but every cause must be tried unless dismissed by consent of the court.

HISTORY: Codes, 1857, ch. 64, art. 367; 1871, § 2872; 1880, § 3103; 1892, § 1458; 1906, § 1531; Hemingway's 1917, § 1293; 1930, § 1318; 1942, § 2566; Laws, 1988, ch. 415, § 2, eff from and after July 1, 1988.

JUDICIAL DECISIONS

1. In general.

It was not an abuse of discretion to refuse to accept defendant's plea bargain in a case charging attempted witness intimidation because (1) the matter was entirely within the court's discretion, (2) defendant did not detrimentally rely on the bargain, (3) the court reasonably explained the court's decision based on an interest in protecting the integrity of the judicial system, and (4) the court did not engage in plea negotiation. Bryant v. State, 238 So. 3d 1213, 2018 Miss. App. LEXIS 97 (Miss. Ct. App. 2018).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that the trial court abused its discretion and arbitrarily refused to accept the first guilty plea, thus preventing him from accepting the plea-bargain agreement for life imprisonment. Given that defendant had no absolute right to have his plea accepted and given that the trial judge did not accept the plea due to his expressed dissatisfaction with appointed counsel, defendant's argument that his plea was arbitrarily rejected was without merit. Wilson v. State, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

Trial court had no obligation to take into consideration offer made as part of a rejected plea bargain when sentencing defendant for manslaughter. Wade v. State, 802 So. 2d 1023, 2001 Miss. LEXIS 240 (Miss. 2001).

The trial court did not err in refusing to grant the state's motion to dismiss a prosecution for burglary of a dwelling where the state sought dismissal of the case based upon its perception of what evidence regarding drug possession and use by the defendant would be allowed or disallowed; the trial court, having determined that the evidence would be allowed for a limited purpose, refused to dismiss the case. Potts v. State, 759 So. 2d 500, 2000 Miss. App. LEXIS 190 (Miss. Ct. App. 2000).

Notwithstanding that the district attorney erred in failing to gain the judge's approval of a plea agreement that involved the nolle prosequi of two cases before her, once the defendants detrimentally relied on the agreement by pleading guilty and testifying about their drug business at their plea hearing before another judge, the first judge abused her discretion by refusing to grant the state's motion to dismiss. State v. Adams County Circuit Court, 735 So. 2d 201, 1999 Miss. LEXIS 118 (Miss. 1999).

If the authority and approval of the circuit court are obtained, the prosecuting attorney may strike an enforceable agreement with a prospective witness that, if he or she will testify as a witness in any pending proceeding, he or she may be granted immunity from prosecution. Wright v. McAdory, 536 So. 2d 897, 1988 Miss. LEXIS 589 (Miss. 1988).

The consent of the court to a compromise of any criminal case is required by this section [Code 1942, § 2566]. Moore v. State, 242 So. 2d 414, 1970 Miss. LEXIS 1375 (Miss. 1970).

Where the order of the court was a nolle prosequi the defendant may be reindicted, or he may be tried upon an indictment charging him with another offense actually committed but for which he was not tried. State v. Thornhill, 251 Miss. 718, 171 So. 2d 308, 1965 Miss. LEXIS 896 (Miss. 1965).

In prosecution for larceny of a calf, the action of trial court in denying motion of district attorney for a nolle pros after all experts who had examined defendant found that he was suffering from mental or nervous disorder and was in need of treatment at a mental institution, was not error. Shipp v. State, 215 Miss. 541, 61 So. 2d 329, 1952 Miss. LEXIS 596 (Miss. 1952), but see Addkison v. State, 608 So. 2d 304, 1992 Miss. LEXIS 452 (Miss. 1992).

OPINIONS OF THE ATTORNEY GENERAL

If an affidavit and warrant is withdrawn by the District Attorney prior to docketing and prior to the matter proceeding past the basic signing of the document, this section would give the court the discretion to charge court costs against a defendant. Pacific, March 24, 1995, A.G. Op. #95-0146.

Based on this section, a prosecutor may dismiss a D.U.I. charge only with consent of the court. Lowrey, July 19, 1996, A.G. Op. #96-0478.

RESEARCH REFERENCES

ALR.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 A.L.R.3d 281.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness. 4 A.L.R.4th 617.

Prosecutor's power to grant prosecution witness immunity from prosecution. 4 A.L.R.4th 1221.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached. 14 A.L.R.4th 1014.

When is federal court justified, under Rule 48(a) of the Federal Rules of Criminal Procedure, in denying government leave to dismiss criminal charges. 48 A.L.R. Fed. 635.

When is dismissal of indictment appropriate remedy for misconduct of government official. 57 A.L.R. Fed. 824.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 715 et seq.

CJS.

22A C.J.S., Criminal Law §§ 543-545 et seq.

§ 99-15-55. Trial where it appears that accused is only guilty of misdemeanor.

If, on the examination into the case of any person brought before a conservator of the peace other than a justice of the peace, on a charge of felony, it shall clearly appear that a felony has not been committed, but that the accused is guilty of a misdemeanor of which a justice of the peace has jurisdiction, the conservator of the peace shall require the accused to be carried before the proper justice of the peace for trial. If the conservator of the peace in such case be a justice of the peace, having territorial jurisdiction of the offense he shall convict the offender and punish him accordingly, but such conviction shall not bar a subsequent prosecution for felony in the same matter.

HISTORY: Codes, 1880, § 3118; 1892, § 1465; 1906, § 1537; Hemingway's 1917, § 1299; 1930, § 1324; 1942, § 2572.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Dismissal of petty misdemeanor charge upon satisfaction of injured party, see § 99-15-51.

JUDICIAL DECISIONS

1. In general.

Where an affidavit charging accused with simple assault has been filed in justice of the peace court and then an indictment was returned charging the accused with assault and battery with intent to kill before he was tried for simple assault, regardless of the outcome of the trial for a misdemeanor, it would be no bar to a subsequent indictment for felony in the same manner. Chester v. State, 216 Miss. 748, 63 So. 2d 99, 1953 Miss. LEXIS 689 (Miss. 1953).

A justice of the peace of a different district than that in which an assault and battery is committed trying the case on the charge of assault and battery with intent to kill and murder has no jurisdiction to try and convict of the lesser offense of assault and battery. Ivy v. State, 141 Miss. 877, 106 So. 111, 1925 Miss. LEXIS 216 (Miss. 1925).

Under this section [Code 1942, § 2572] the accused has the right to be fully advised in the affidavit of the nature and cause of the crime charged. Brown v. State, 103 Miss. 664, 60 So. 727, 1912 Miss. LEXIS 214 (Miss. 1912).

If one charged with a felony be convicted by the justice of a constituent misdemeanor and he appeal and on trial in the circuit court the verdict be "guilty as charged in the affidavit," the verdict will be limited to the charge in the affidavit of which the accused was convicted, the misdemeanor. Hastings v. State, 59 Miss. 541, 1882 Miss. LEXIS 154 (Miss. 1882).

OPINIONS OF THE ATTORNEY GENERAL

Under this section, at the conclusion of a preliminary hearing where the municipal judge finds no probable cause for a felony, but sufficient evidence to convict the accused of a misdemeanor, he should bind the offender over to the justice court judge within proper jurisdiction to hear the case. See also Section 21-23-7. Mitchell, May 11, 1995, A.G. Op. #95-0182.

§ 99-15-57. Relief for certain persons who pled guilty within six months prior to March 31, 1983.

(1) Any person who pled guilty within six (6) months prior to March 31, 1983, and who would have otherwise been eligible for the relief allowed in Section 99-15-26, may apply to the court in which such person was sentenced for an order to expunge from all official public records all recordation relating to his arrest, indictment, trial, finding of guilty and sentence. If the court determines, after hearing, that such person has satisfactorily served his sentence or period of probation and parole, pled guilty within six (6) months prior to March 31, 1983, and would have otherwise been eligible for the relief allowed in Section 99-15-26, it may enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures

to recite or acknowledge such arrest, or indictment or trial in response to any inquiry made of him for any purpose.

(2) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

HISTORY: Laws, 1986, ch. 362; Laws, 1996, ch. 454, § 4; Laws, 2003, ch. 557, § 3, eff from and after passage (approved Apr. 24, 2003); Laws, 2019, ch. 466, § 42, eff from and after July 1, 2019.

Editor's Notes — Laws of 2019, ch. 466, § 1 provides as follows:

"SECTION 1. This act shall be known and may be cited as the 'Criminal Justice Reform Act.' "

Amendment Notes — The 2019 amendment added "or the person was found not guilty at trial" at the end of (2), and made a related change.

JUDICIAL DECISIONS

1. In general.

Petitioner Clay was not eligible for relief under subsection (1) because all three of his guilty pleas occurred on September 19, 1979. Clay v. State, 232 So. 3d 196, 2017 Miss. App. LEXIS 287 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 503 (Miss. 2017), cert. denied, 229 So. 3d 714, 2017 Miss. LEXIS 513 (Miss. 2017).

Request to be sentenced pursuant to Miss. Code Ann. § 99-15-26 can be offered during plea negotiations, but it is within the circuit or county judge's discretion to accept such a request; in defendant's case, the circuit court did not withhold acceptance of defendant's guilty plea; instead, it accepted defendant's guilty plea and adjudicated defendant accordingly, with defendant receiving a four year suspended sentence and five years of probation. Thus, the circuit court did not err in denying defendant's petition for expungement. Turner v. State, 876 So. 2d 1056, 2004 Miss. App. LEXIS 605 (Miss. Ct. App. 2004).

Trial court lacked jurisdiction to expunge defendant's criminal record because the trial court did not withhold acceptance of her guilty plea when defendant pled on September 23, 1996; the trial court sentenced defendant to regular probation; because defendant was not sentenced under Miss. Code Ann. § 99-15-26, her argument was without merit. Smith v. State, 869 So. 2d 425, 2004 Miss. App. LEXIS 251 (Miss. Ct. App. 2004).

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of Mississippi has specifically authorized expungment of criminal offender records in limited cases-youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungment of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that any person who pled guilty within 6 months prior to the effective date of § 99-15-26 (March 31, 1983) may apply to the court for an order expunging his or her criminal records. Under §§ 99-15-57 and 99-15-26 a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to §§ 99-15-57 and 99-15-26 if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the "within 6 months prior to" March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the criterion in any of the statutes authorizing expungment, and thus the trial court did not err in denying his petition for expungment. Caldwell v. State, 564 So. 2d 1371, 1990 Miss. LEXIS 262 (Miss. 1990).

RESEARCH REFERENCES

ALR.

State court's power to place defendant on probation without imposition of sentence. 56 A.L.R.3d 932.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 A.L.R.4th 778.

Admissibility of evidence of other offense where record has been expunged or erased. 82 A.L.R.4th 913.

Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute. 68 A.L.R.6th 1.

Judicial Expunction of Criminal Record of Convicted Adult Under Statute – General Principles, and Expunction of Criminal Records Under Statutes Providing for Such Relief Where Criminal Proceeding Is Terminated in Favor of Defendant, upon Completion of Probation, upon Suspended Sentence, and Where Expungement Relief Predicated upon Type, and Number, of Offenses. 69 A.L.R.6th 1.

Criminal Defendant's Right to Electronic Recordation of Interrogations and Confessions. 69 A.L.R.6th 579.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 843 et seq.

§ 99-15-59. Expunction of misdemeanor charges.

Any person who is arrested, issued a citation, or held for any misdemeanor and not formally charged or prosecuted with an offense within twelve (12) months of arrest, or upon dismissal of the charge, may apply to the court with jurisdiction over the matter for the charges to be expunged.

HISTORY: Laws, 1998, ch. 556, § 1, eff from and after July 1, 1998.

Cross References — Dismissal of petty misdemeanor charge upon satisfaction of injured party, see § 99-15-51.

PRETRIAL INTERVENTION PROGRAM

Sec.
99-15-101. Citation of Sections 99-15-101 through 99-15-127.
99-15-103. Definitions.
99-15-105. Establishment of pretrial intervention program; role of district attorney; application.
99-15-107. Ineligibility for intervention.
99-15-109. Conditions when intervention is appropriate.
99-15-111. Information required from offender prior to admittance into program.
99-15-113. Recommendations of victim and law enforcement agency as to offender's admittance into program.
99-15-115. Waiver and agreements required of offender who enters program.
99-15-117. Agreement between district attorney and offender outlining terms of program; approval by court.
99-15-119. Written reports retained for all offenders accepted into program; information furnished to Mississippi Justice Information Center.

Sec.	
99-15-121.	Restitution required prior to completion of program.
99-15-123.	Disposition of charges upon successful completion of program; violation of program agreement by offender; expunction of record.
99-15-125.	Law enforcement officer precluded from referring to program as inducement to any statement, confession or waiver by offender; exception.
99-15-127.	Department of Corrections, Division of Community Corrections to support program.

§ 99-15-101. Citation of Sections 99-15-101 through 99-15-127.

Sections 99-15-101 through 99-15-127 shall be known and may be cited as the "Pretrial Intervention Act."

HISTORY: Laws, 1983, ch. 445, § 1; reenacted without change, Laws, 1987, ch. 329, § 1, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual who participates in pretrial intervention program established under §§ 99-5-101 et seq., see § 45-1-29.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

JUDICIAL DECISIONS

1. Attorney discipline proceedings.

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former requires the entry of a sworn guilty plea before the circuit or county court while the latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect the attorney's felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. Miss. Bar v. Cofer, 904 So. 2d 97, 2004 Miss. LEXIS 1032 (Miss. 2004), dismissed, 2011 Miss. LEXIS 253 (Miss. May 12, 2011).

OPINIONS OF THE ATTORNEY GENERAL

An individual charged with an implied consent violation may be placed in a pretrial intervention program as specified by Sections 99-15-101 through 99-15-127. Helfrich, April 5, 1996, A.G. Op. #96-0193.

The Pretrial Intervention Act does not authorize a circuit court to use program funds to support a court-sponsored community service project. Hedgepeth, May 30, 2003, A.G. Op. 03-0165.

Neither the district attorney nor the circuit court has the authority to increase pretrial intervention program fees to pay the cost of operating a court-sponsored community service project. Hedgepeth, May 30, 2003, A.G. Op. 03-0165.

A district attorney may not use funds intended to pay the expenses of a pretrial intervention program to pay the costs associated with a court-sponsored community service project. Hedgepeth, May 30, 2003, A.G. Op. 03-0165.

RESEARCH REFERENCES

ALR.

Pretrial diversion: statute or court rule authorizing suspension or dismissal of criminal prosecution on defendant's consent to noncriminal alternative. 4 A.L.R.4th 147.

§ 99-15-103. Definitions.

For purposes of Sections 99-15-101 through 99-15-127, the following words shall have the meaning ascribed herein unless the context shall otherwise require:

(a) "Prosecutorial discretion" means the power of the district attorney to consider all circumstances of criminal proceedings and to determine whether any legal action is to be taken and, if so taken, of what kind and degree and to what conclusion.

(b) "Noncriminal disposition" means the dismissal of a criminal charge without prejudice to the state to reinstate criminal proceedings on motion of the district attorney.

HISTORY: Laws, 1983, ch. 445, § 2; reenacted, Laws, 1987, ch. 329, § 2, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

§ 99-15-105. Establishment of pretrial intervention program; role of district attorney; application.

(1) Each district attorney, with the consent of a circuit court judge of his district, shall have the prosecutorial discretion as defined herein and may as a matter of such prosecutorial discretion establish a pretrial intervention program in the circuit court districts.

(2) A pretrial intervention program shall be under the direct supervision and control of the district attorney.

(3) An offender must make application to an intervention program within the time prescribed by the district attorney.

HISTORY: Laws, 1983, ch. 445, § 3; reenacted, Laws, 1987, ch. 329, § 3, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

RESEARCH REFERENCES

ALR.

Pretrial diversion: statute or court rule authorizing suspension or dismissal of criminal prosecution on defendant's consent to noncriminal alternative. 4 A.L.R.4th 147.

§ 99-15-107. Ineligibility for intervention.

A person shall not be considered for intervention if he or she has been charged with any crime of violence pursuant to Section 97-3-2. A person shall not be eligible for acceptance into the intervention program provided by Sections 99-15-101 through 99-15-127 if such person has been charged with an offense pertaining to trafficking in a controlled substance, as provided in Section 41-29-139(f).

HISTORY: Laws, 1983, ch. 445, § 4; reenacted, Laws, 1987, ch. 329, § 4; Laws, 2014, ch. 457, § 13, eff from and after July 1, 2014.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Conditions when intervention is appropriate, see § 99-15-109.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Crime of violence.

1. In general.

Burglary of a dwelling constitutes a crime of violence for Miss. Code Ann. § 99-18-83 purposes as Miss. Code Ann. § 99-15-107 identifies burglary of a dwelling as a crime of violence, and there is a significant prospect of violence presented by every burglary of a dwelling because a dwelling is a place of human abode. Brown v. State, 102 So. 3d 1130, 2011 Miss. App. LEXIS 361 (Miss. Ct. App. 2011).

2. Crime of violence.

In a matter of first impression, the appellate court held that defendant's conviction of burglary of a dwelling under former Miss. Code Ann. § 97-17-19 constituted a crime of violence for Miss. Code Ann. § 99-18-83 purposes as Miss. Code Ann. § 99-15-107 identified burglary of a dwelling as a crime of violence, and there was a significant prospect of violence presented by every burglary of a dwelling because a dwelling was a place of human abode. Brown v. State, 102 So. 3d 1130, 2011 Miss. App. LEXIS 361 (Miss. Ct. App. 2011).

OPINIONS OF THE ATTORNEY GENERAL

The court must make an independent determination as to whether a particular offense is a "crime of violence." Chamberlin, Mar. 2, 2006, A.G. Op. 05-0471.

A court would have discretion to approve a remand to the pretrial intervention program provided the individual remained eligible under the provisions of Sections 99-15-101 et seq., and the district attorney agreed to the remand. Chamberlin, Mar. 2, 2006, A.G. Op. 05-0471.

In determining whether a particular offense is a "crime of violence," the court may may use the definition of "nonviolent crime" in Section 47-7-3(1)(g) as a tool in reaching its decision. Chamberlin, Mar. 2, 2006, A.G. Op. 05-0471.

Section 21-23-7 allows establishment of a work program, usually for people who are not incarcerated. Nowak, July 28, 2006, A.G. Op. 06-0268.

A defendant charged with statutory rape is ineligible for the pretrial intervention program even if the facts do not involve any use of force or violence. Brewer, July 28, 2006, A.G. Op. 06-0289.

§ 99-15-109. Conditions when intervention is appropriate.

(1) Intervention shall be appropriate only when:

(a) The offender is eighteen (18) years of age or older;

(b) There is substantial likelihood that justice will be served if the offender is placed in an intervention program;

(c) It is determined that the needs of the offender and the state can better be met outside the traditional criminal justice process;

(d) It is apparent that the offender poses no threat to the community;

(e) It appears that the offender is unlikely to be involved in further criminal activity;

(f) The offender, in those cases where it is required, is likely to respond quickly to rehabilitative treatment;

(g) The offender has no significant history of prior delinquency or criminal activity;

(h) The offender has been indicted and is represented by an attorney; and

(i) The court has determined that the office of district attorney or the department of corrections has sufficient support staff to administer such intervention program.

(2) When jurisdiction in a case involving a child is acquired by the circuit court pursuant to a transfer from the youth court, the provision of subsection (1)(a) of this section shall not be applicable.

(3) Notwithstanding any other provision of this section, in all criminal cases wherein an offender has been held in contempt of court for failure to pay fines or restitution, the offender may be placed in pretrial intervention for the purpose of collecting unpaid restitution and fines regardless of any prior criminal conviction, whether felony or misdemeanor.

HISTORY: Laws, 1983, ch. 445, § 5; reenacted, Laws, 1987, ch. 329, § 5; Laws, 2006, ch. 453, § 1, eff from and after July 1, 2006.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on

state highway projects, see § 65-1-8.
Ineligibility for intervention, see § 99-15-107.
Information required from offender prior to admittance into program, see § 99-15-111.
Recommendations of victim and law enforcement agency as to offender's admittance into program, see § 99-15-113.
Waiver and agreements required of offender who enters program, see § 99-15-115.

OPINIONS OF THE ATTORNEY GENERAL

Provision of the the Pretrial Intervention Act that the offender has been indicted and is represented by an attorney would not apply to defendants charged with misdemeanor offenses in justice or municipal courts. Bates, Apr. 2, 2004, A.G. Op. 04-0144.

§ 99-15-111. Information required from offender prior to admittance into program.

Prior to admittance of an offender into an intervention program, the district attorney may require the offender to furnish information concerning the offender's past criminal record, education and work record, family history, medical or psychiatric treatment or care received, psychological tests taken and other information which, in the district attorney's opinion, bears on the decision as to whether the offender should be admitted.

HISTORY: Laws, 1983, ch. 445, § 6; reenacted, Laws, 1987, ch. 329, § 6, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:
"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."
Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.
Agreement between district attorney and offender, terms of intervention, see § 99-15-117.
Restitution required prior to completion of program, see § 99-15-121.
Ineligibility for intervention, see § 99-15-107.
Conditions when intervention is appropriate, see § 99-15-109.

§ 99-15-113. Recommendations of victim and law enforcement agency as to offender's admittance into program.

Prior to any person's admittance to a pretrial intervention program the victim, if any, of the crime for which the applicant is charged and the law enforcement agency employing the arresting officer shall be asked to comment in writing as to whether or not the applicant should be allowed to enter an intervention program. In each case involving admission to an intervention program, the district attorney and a circuit court judge of his district shall consider the recommendations of the law enforcement agency and the victim, if any, in making a decision.

HISTORY: Laws, 1983, ch. 445, § 7; reenacted, Laws, 1987, ch. 329, § 7, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:
"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' effective July 1, 1987, is hereby repealed."
Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.
Ineligibility for intervention, see § 99-15-107.
Conditions when intervention is appropriate, see § 99-15-109.

§ 99-15-115. Waiver and agreements required of offender who enters program.

An offender who enters an intervention program shall:

(a) Waive, in writing and contingent upon his successful completion of the program, his or her right to a speedy trial;

(b) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court;

(c) Agree, in writing, to the conditions of the intervention program established by the district attorney which shall not require or include a guilty plea;

(d) In the event there is a victim of the crime, agree, in writing, to make restitution to the victim within a specified period of time and in an amount to be determined by the district attorney and approved by the court; and

(e) Agree, in writing, to waive extradition.

HISTORY: Laws, 1983, ch. 445, § 8; reenacted, Laws, 1987, ch. 329, § 8, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:
"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."
Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.
Voidance of waiver executed pursuant to this section on date offender is removed from program for violation of program agreement, see § 99-15-123.
Prohibition of reference to program as inducement to any statement, confession or waiver by offender, see § 99-15-125.

RESEARCH REFERENCES

ALR.
Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.
Validity of state statute imposing mandatory sentence or prohibiting granting of probation or sentence suspension of sentence for narcotics offenses. 81 A.L.R.3d 1192.

Am. Jur.
21A Am. Jur. 2d, Criminal Law §§ 866 et seq.

§ 99-15-117. Agreement between district attorney and offender outlining terms of program; approval by court.

In any case in which an offender agrees to an intervention program, a specific agreement shall be made between the district attorney and the offender. This agreement shall include the terms of the intervention program, the length of the program, which shall not exceed three (3) years, and a section therein stating the period of time after which the prosecutor will either dismiss the charge or seek a conviction based upon that charge. The agreement shall be signed by the offender and his or her counsel and filed in the district attorney's office. Before an offender is admitted to an intervention program, the court having jurisdiction of the charge must approve of the offender's admission to the program and the terms of the agreement.

HISTORY: Laws, 1983, ch. 445, § 9; reenacted, Laws, 1987, ch. 329, § 9, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Ineligibility for intervention, see § 99-15-107.

Conditions when intervention is appropriate, see § 99-15-109.

Restitution required prior to completion of program, see § 99-15-121.

Violation of agreement, see § 99-15-123.

OPINIONS OF THE ATTORNEY GENERAL

A pre-trial intervention agreement may provide for a work program for offenders and it would be properly included in the agreement if the statutory requirements are met. Parrish, Sept. 11, 2006, A.G. Op. 06-0402.

§ 99-15-119. Written reports retained for all offenders accepted into program; information furnished to Mississippi Justice Information Center.

In all cases where an offender is accepted for intervention a written report shall be made and retained on file in the district attorney's office, regardless of whether or not the offender successfully completes the intervention program. The district attorney shall furnish to the Mississippi Justice Information Center personal identification information on each person accepted for intervention. This information shall only be released by the Mississippi Justice Information Center in those cases where a district attorney inquires as to whether a person has previously been accepted into an intervention program.

HISTORY: Laws, 1983, ch. 445, § 10; reenacted, Laws, 1987, ch. 329, § 10, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Mississippi Justice Information Center generally, see §§ 45-27-1 et seq.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

OPINIONS OF THE ATTORNEY GENERAL

The statute requires all district attorneys to furnish certain personal identification information to the Mississippi Justice Information Center (MJIC), which may only be released by MJIC in cases in which district attorneys are determining if an individual has ever participated in such a program in the past; as non-public records, information maintained pursuant to the statute is not subject to expunction as it is an integral part of determining an individual's eligibility to the program. Spann, Jan. 24, 2000, A.G. Op. #99-0694.

§ 99-15-121. Restitution required prior to completion of program.

Prior to the completion of the pretrial intervention program the offender shall make restitution, as determined by the district attorney and approved by the court, to the victim, if any, and shall pay any expenses to the administrator of this program which are incurred as a result of his participation in the program. The amount of such expenses shall be determined by the district attorney and made part of the initial agreement between the district attorney and the offender.

HISTORY: Laws, 1983, ch. 445, § 11; reenacted, Laws, 1987, ch. 329, § 11, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Agreement between district attorney and offender outlining terms of program, see § 99-15-117.

OPINIONS OF THE ATTORNEY GENERAL

This section provides that any participant in pretrial intervention program "shall pay any expenses to the administrator of this program which are incurred as a result of his participation in the program"; such payments may be used to pay additional compensation to employees of District Attorney's office that administers pretrial intervention program, including victim's assistance coordinator or investigator. Kitchens, Feb. 25, 1993, A.G. Op. #93-0093.

A district attorney may charge an administrative fee to participants in a pretrial intervention program to offset background check expenses; however, there is no authority for the expenses to be charged against a defendant who has been rejected for the pretrial intervention program. Peterson, Sept. 13, 2002, A.G. Op. #02-0530.

If a pretrial intervention agreement calls for random drug testing of the offender, then the district attorney may charge the offender the costs associated with such drug testing. There is no prohibition against the district attorney contracting with a drug court to perform such drug testing. Lawrence, Mar. 5, 2004, A.G. Op. 04-0086.

Funds received for participation in the pretrial intervention program may be used by the district attorney's office in a manner to be determined by the district attorney. Clark, Feb. 17, 2006, A.G. Op. 06-0057.

Pretrial diversion funds may be expended to pay for a portion of the cost of courtroom audio-video equipment which would be used by the district attorney's office. Buckley, June 2, 2006, A.G. Op. 06-0197.

Under Miss. Code Ann. § 99-15-121, pretrial intervention funds may be used to supplement the salary of a Grand Jury Coordinator having pretrial intervention program duties, as well as the salaries of assistant district attorneys and other employees of the District Attorney's office who have pretrial intervention duties or administer the program. Lawrence, March 23, 2007, A.G. Op. #07-00151, 2007 Miss. AG LEXIS 118.

RESEARCH REFERENCES

ALR.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Validity of state statute imposing mandatory sentence or prohibiting granting of probation or sentence suspension of sentence for narcotics offenses. 81 A.L.R.3d 1192.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 866 et seq.

§ 99-15-123. Disposition of charges upon successful completion of program; violation of program agreement by offender; expunction of record.

(1) In the event an offender successfully completes a pretrial intervention program, the court shall make a noncriminal disposition of the charge or charges pending against the offender.

(2) In the event the offender violates the conditions of the program agreement: (a) the district attorney may terminate the offender's participation in the program, (b) the waiver executed pursuant to Section 99-15-115 shall be void on the date the offender is removed from the program for the violation, and (c) the prosecution of pending criminal charges against the offender shall be resumed by the district attorney.

(3) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

HISTORY: Laws, 1983, ch. 445, § 12; reenacted, Laws, 1987, ch. 329, § 12; Laws, 2008, ch. 444, § 1, eff from and after July 1, 2008.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention

Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

Agreement between district attorney and offender outlining terms of program, see § 99-15-117.

JUDICIAL DECISIONS

1. Attorney discipline proceedings.

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former requires the entry of a sworn guilty plea before the circuit or county court while the latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect the attorney's felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. Miss. Bar v. Cofer, 904 So. 2d 97, 2004 Miss. LEXIS 1032 (Miss. 2004), dismissed, 2011 Miss. LEXIS 253 (Miss. May 12, 2011).

§ 99-15-125. Law enforcement officer precluded from referring to program as inducement to any statement, confession or waiver by offender; exception.

No law enforcement officer shall refer to, mention and/or offer participation in this program as an inducement to any statement, confession or waiver of any constitutional rights of any person accused of a crime except those enumerated in Section 99-15-115.

HISTORY: Laws, 1983, ch. 445, § 13; reenacted, Laws, 1987, ch. 329, § 13, eff from and after July 1, 1987.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

§ 99-15-127. Department of Corrections, Division of Community Corrections to support program.

The Department of Corrections, Division of Community Corrections, is directed to support Sections 99-15-101 through 99-15-127 to the extent that field support personnel are available in circuit court districts, and the Commissioner of Corrections shall certify to the court that the Division of Community Corrections has sufficient field parole officers to supervise and oversee those individuals who may be placed in this program by the court.

HISTORY: Laws, 1983, ch. 445, § 14; reenacted, Laws, 1987, ch. 329, § 14; Laws, 2002, ch. 624, § 9, eff from and after July 1, 2002.

Editor's Notes — Laws of 1987, ch. 329, § 15, provides as follows:

"SECTION 15. Chapter 445, Laws of 1983, which repeals the 'Pretrial Intervention Act' (codified as §§ 99-15-101 through 99-15-127) effective July 1, 1987, is hereby repealed."

Cross References — General powers and duties of department of corrections, division of community services, see § 47-7-9.

Authority for use of persons convicted of an offense for work on state highway projects, see § 65-1-8.

OPINIONS OF THE ATTORNEY GENERAL

An individual charged with an implied consent violation may be placed in a pretrial intervention program as specified by Sections 99-15-101 through 99-15-127. Helfrich, April 5, 1996, A.G. Op. #96-0193.

CHAPTER 17.

TRIAL

Sec.
99-17-1. Indictments to be tried within 270 days of arraignment.
99-17-3. Peremptory challenges; number allowed.
99-17-5. Peremptory challenges; joint defendant must agree.
99-17-7. Interpreters.
99-17-9. Trial in the absence of accused.
99-17-11. Only two counsel to a side heard.
99-17-13. Variance between indictment and proof; amendment of record and indictment; continuance.
99-17-15. Variance between indictment and proof; amendment of record and indictment; order for amendment.
99-17-17. Joint defendants are competent witnesses for one another in separate trials.
99-17-19. Assaults; insulting words admissible.
99-17-20. Capital murder or other crimes punishable by death.
99-17-21. Bribery; certain proof not necessary.
99-17-23. Dueling; offender compelled to testify against another.
99-17-25. Gambling and futures contracts; state not confined to proof of single violation.
99-17-27. Gambling and futures contracts; witness compelled to testify; immunity granted; penalty for refusing.
99-17-29. Lotteries; purchaser of ticket compelled to testify against seller.
99-17-31. Offenses affecting legislature; witness denied privilege against self-incrimination.
99-17-33. Perjury; no variance between "sworn" and "affirmed.".
99-17-35. Instructions to jury.
99-17-37. Papers may be carried out by jury.
99-17-39. Bills of exceptions; duty of judge to sign.
99-17-41. Bills of exceptions; when tendered and signed; incapacity of judge.
99-17-43. Bills of exceptions; attorneys may sign if judge refuses.
99-17-45. Bills of exception; amendment.
99-17-47. New trials; terms directed by court; number limited.
99-17-49. New trials; grant or refusal assignable for error.

§ 99-17-1. Indictments to be tried within 270 days of arraignment.

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

HISTORY: Codes, 1857, ch. 64, art. 285; 1871, § 2785; 1880, § 3073; 1892, § 1421; 1906, § 1494; Hemingway's 1917, § 1252; 1930, § 1275; 1942, § 2518; Laws, 1976, ch. 420, eff from and after July 1, 1976.

Cross References — Continuances in criminal cases generally, see § 99-15-29.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Good cause for delay.
3. Delay attributed to defendant.
4. Delay attributed to State.
5. State's burden.
6. Commencement of period.
7. Waiver of right.
8. On retrial.
9. Continuances; generally.
10. —At defendant's request.
11. —At state's request.
12. —Due to court congestion.
13. Length of delay.
14. — No prejudice; length of delay.
15. Demand for trial.
16. Guilty plea.
17. Arraignment.

1. In general.

Defendant's statutory speedy trial claim failed as it was only supported by broad assertions that had no support in the record. Humbles v. State, 228 So. 3d 838, 2017 Miss. App. LEXIS 39 (Miss. Ct. App.), cert. denied, 223 So. 3d 785, 2017 Miss. LEXIS 299 (Miss. 2017).

Because the reasons for the delay either slightly weighed against the State, weighed against defendant, or were neutral reasons, the State did not violate defendant's statutory right to a speedy trial. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Based on its analysis under the Barker factors on the facts of this case, the appellate court found that defendant was not denied the right to a speedy trial. Springer v. State, 187 So. 3d 1050, 2015 Miss. App. LEXIS 589 (Miss. Ct. App. 2015).

Circuit court did not err in denying defendant's motion to dismiss for lack of a speedy trial because the State bore no responsibility for any of the delays, defendant filed a motion to dismiss a week before his trial, instead of filing a motion demanding a speedy trial, and defendant's defense was not impaired as a result of the delay. McKnight v. State, 187 So. 3d 635, 2015 Miss. App. LEXIS 276 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 142 (Miss. 2016).

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221, 2007 Miss. LEXIS 278 (Miss. 2007).

There was no violation of defendant's constitutional right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 or his statutory right to a speedy trial under Miss. Code Ann. § 99-17-1 because although the four-year delay between his arraignment and his trial was unusual, most of the delay was not attributable to the State or defendant, but rather to a crime lab backlog and the appointment of new counsel. Also defendant failed to show he was prejudiced by the delay where he failed to provide the name of an alleged exculpatory witness. Manix v. State, 895 So. 2d 167, 2005 Miss. LEXIS 112 (Miss. 2005).

Although the time between defendant's arrest and his trial for attempted kidnapping was substantial, a portion of the delay was excluded from the "270 day rule" provided in Miss. Code Ann. § 99-17-1 as being attributable to defendant, and he failed to show how his case was prejudiced by the delay. Therefore defendant's right to a speedy trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Miss. Const. Art. 3, § 26 was not violated. Hersick v. State, 904 So. 2d 116, 2004 Miss. LEXIS 1351 (Miss. 2004).

Defendant failed to establish that his statutory right to a speedy trial was violated despite the 540-day delay, as 320 days of the delay were attributable to defendant and his counsel as a result of continuances, change in counsel, and earnest plea negotiations. Wesley v. State, 872 So. 2d 763, 2004 Miss. App. LEXIS 433 (Miss. Ct. App. 2004).

In an escape case, defendant was not denied his constitutional or statutory right to a speedy trial, because 899 of the 991 days that elapsed between the escape and the trial were attributable to defendant, and defendant suffered no prejudice as a result of the delay. Jenkins v. State, 881 So. 2d 870, 2003 Miss. App. LEXIS 1133 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 888 So. 2d 1171, 2004 Miss. LEXIS 1268 (Miss. 2004).

More than four years expired between defendant's arrest and trial for murder, but defendant was free on bond after the first year, made no demand for a speedy trial, failed to show any prejudice to the defense, or that the State had intentionally delayed the investigation in its search for critical eyewitnesses and other evidence. Defendant's right to a speedy trial was not violated under the Sixth and Fourteenth Amendments to the United States Constitution, or Miss. Const. Art. III, § 26. Moore v. State, 837 So. 2d 794, 2003 Miss. App. LEXIS 81 (Miss. Ct. App. 2003).

A delay of approximately 14 months between movant's arrest and guilty plea was presumptively prejudicial as the record contained no evidence of the reason for delay, which weighed against the State, movant asserted counsel had failed to advise movant of the right to a speedy trial, counsel was ineffective, and the prejudice factor weighed in movant's favor; thus, the trial court erred in denying movant's post-conviction relief motion on the issue without a hearing, and the matter was remanded for an evidentiary inquiry. Robinson v. State, 920 So. 2d 1009, 2003 Miss. App. LEXIS 229 (Miss. Ct. App. 2003), limited, Hill v. State, 60 So. 3d 824, 2011 Miss. App. LEXIS 260 (Miss. Ct. App. 2011).

In a post-conviction relief case, appellant's claim that he was denied due process because he was never arraigned and his right to a speedy trial was violated failed; the record appellant submitted on appeal contained no evidence of whether appellant was arraigned or when, or of the number of days he waited for the plea hearing after arrest. Brooks v. State, 832 So. 2d 607, 2002 Miss. App. LEXIS 855 (Miss. Ct. App. 2002).

Where defendant caused part of the delay, and was not prejudiced by it, and the State brought the action to trial as soon as was possible due to the overcrowded docket, there was no violation of defendant's statutory right to trial. Anthony v. State, 843 So. 2d 51, 2002 Miss. App. LEXIS 511 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. App. LEXIS 411 (Miss. Ct. App. 2003).

The defendant's right to a speedy trial was not violated when he was taken into custody for violation of his appeal bond and indicted 11 months later, because the delay was not excrutiatingly long, he made no plea for a speedy trial and he showed no real prejudice. Coleman v. State, 725 So. 2d 154, 1998 Miss. LEXIS 377 (Miss. 1998).

Constitutional right to speedy trial exists separately from the statutory right. Simmons v. State, 678 So. 2d 683, 1996 Miss. LEXIS 285 (Miss. 1996).

For speedy trial purposes, finding of good cause for delay is finding of ultimate fact, and should be treated on appeal as any other finding of fact; it will be left undisturbed where there is in record substantial credible evidence from which it could have been made. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

If trial judge applied erroneous standard in ruling on motion to dismiss on speedy trial grounds, Supreme Court will not affirm trial court's finding of fact. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

For speedy trial purposes, post-delay determinations of "good cause" for delay are permissible. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

Defendant's statutory right to speedy trial was not violated by 235-day delay after arraignment; continuance order was finding of "good cause" covering 63- day delay between date of first trial setting until second trial setting, and, since day 269 fell on a Friday, neither Saturday nor Sunday counted in the computation of time period. Skaggs v. State, 676 So. 2d 897, 1996 Miss. LEXIS 317 (Miss. 1996).

Where day 269 of statutory speedy trial period falls on Friday, neither Saturday nor Sunday counts in computation of time. Skaggs v. State, 676 So. 2d 897, 1996 Miss. LEXIS 317 (Miss. 1996).

In calculating period of time between a defendant's arraignment and trial for purposes of determining whether defendant's statutory right to speedy trial has been violated, arraignment date does not count but trial date does, as do weekends unless 270th day following arraignment falls on Sunday. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

Where defendant's statutory right to speedy trial is violated, trial court must determine if violation prejudiced defendant's ability to defend against charge and if state deliberately engaged in oppressive conduct; if prejudice is present, court must dismiss proceeding and render, and if prejudice is not present, court must dismiss case for possible reindictment. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

Where defendant's statutory right to speedy trial is violated, there is no prejudice to defendant if he is serving sentence on unrelated charges. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

Defendant's statutory right to speedy trial was not violated, despite total time between his arraignment on charge of capital rape and his trial of 355 days and statutory threshold of 270 days; 44 days of delay were attributable to continuances requested by defense, and at least 154 days were attributable to efforts of defense attorney to work out plea bargain, leaving total of 157 days of delay attributable to state. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

The balancing test used in criminal proceedings for determining whether the right to a speedy trial has been violated is not applicable in an attorney disciplinary action; although attorney disciplinary proceedings are quasi-criminal in nature, they are not governed by the same rules that are utilized in criminal proceedings. Barrett v. The Mississippi Bar, 648 So. 2d 1154, 1995 Miss. LEXIS 27 (Miss. 1995).

The Supreme Court has subject matter jurisdiction to hear an appeal by the State from a dismissal with prejudice for violation of this section's 270-day rule under § 99-35-103(a). State v. Harrison, 648 So. 2d 66, 1994 Miss. LEXIS 633 (Miss. 1994).

Dismissal with prejudice is not required by this section unless the State, upon the finding of a violation, fails to persuade the court that the violation did not prejudice the defendant's ability to defend against the charge and that the State did not deliberately engage in oppressive conduct; if the court is so persuaded, the remedy shall be dismissal without prejudice to reindictment. State v. Harrison, 648 So. 2d 66, 1994 Miss. LEXIS 633 (Miss. 1994).

This section was not violated, even though 273 days elapsed from the time the defendant was arraigned to the date he filed his motion to dismiss, where the statute was tolled for 23 days during plea negotiations, a continuance carrying the case over to the following term due to a congested trial docket tolled the statute for an additional 14 days, the defendant did not object to that continuance, the statute was again tolled for 5 days between the time of the motion to dismiss and the hearing on that motion, the case was tried within 30 days after the motion to dismiss was overruled, and there was no prejudice to the defendant, as he was already incarcerated for a parole violation of a previous felony conviction and was also under indictment for another offense for which he was awaiting trial. Winder v. State, 640 So. 2d 893, 1994 Miss. LEXIS 347 (Miss. 1994).

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. Gray v. State, 605 So. 2d 791, 1992 Miss. LEXIS 481 (Miss. 1992).

Although long delays between the time of arrest and arraignment have the potential to violate the defendant's constitutional right to a speedy trial even if the 270 day mandate of this section has been met, the State's compliance with this section would be viewed as significant when determining whether the defendant's constitutional right to a speedy trial had been violated. Spencer v. State, 592 So. 2d 1382, 1991 Miss. LEXIS 965 (Miss. 1991).

The statutorily created right to a speedy trial was never invoked where the defendant entered his pleas of guilty on the day he was arraigned. Anderson v. State, 577 So. 2d 390, 1991 Miss. LEXIS 180 (Miss. 1991).

Since the right to a speedy trial is a right personal to the accused, the right should not be waived because of delays occasioned by a co-defendant for which the accused was not in any way responsible. Flores v. State, 574 So. 2d 1314, 1990 Miss. LEXIS 851 (Miss. 1990).

The constitutional right to a speedy trial attaches when a person has been accused. Smith v. State, 550 So. 2d 406, 1989 Miss. LEXIS 455 (Miss. 1989).

A defendant was denied his constitutional right to a speedy trial, even though he did not assert his right to a speedy trial until 5 days before trial began, where 370 days elapsed between the date he was arrested and the date his trial began and, because the defendant was convicted in federal court on the charge of making a false statement in the acquisition of a firearm 279 days after his arrest in the case in question, the delay resulted in the defendant being sentenced as an habitual offender. Smith v. State, 550 So. 2d 406, 1989 Miss. LEXIS 455 (Miss. 1989).

Compliance with this section does not necessarily mean that a defendant's constitutional right to a speedy trial has been respected. Smith v. State, 550 So. 2d 406, 1989 Miss. LEXIS 455 (Miss. 1989).

The mere fact that the defendant is in custody for another crime is generally not a sufficient reason for delaying a trial. However, the situation is different where the defendant is facing a death sentence for the other crime; a court is justified in choosing not to expend scarce judicial and prosecutorial resources in trying a defendant facing a death sentence, the execution of which would eliminate the need for any trial at all. Fisher v. State, 532 So. 2d 992, 1988 Miss. LEXIS 438 (Miss. 1988).

This section has no application in action by Mississippi State Bar seeking disbarment of attorney based on convictions for checks issued when attorney had insufficient funds in bank to pay amount of checks. Mississippi State Bar Asso. v. Cotter, 512 So. 2d 1288, 1987 Miss. LEXIS 2819 (Miss. 1987).

Plea negotiations will not always constitute good cause for delay under 270 day rule, because such rule could serve no useful purpose and would defeat the very purpose and protections established by 270 day rule. Reed v. State, 506 So. 2d 277, 1987 Miss. LEXIS 2483 (Miss. 1987).

Where the time lapse between arraignment and trial was only 109 days, the case did not fall under this section. Lightsey v. State, 493 So. 2d 375, 1986 Miss. LEXIS 2583 (Miss. 1986).

Nine hundred and forty-six day delay between arraignment and trial on charges of burglary and being habitual criminal does not violate defendant's speedy trial right where defendant is originally imprisoned pursuant to voluntary plea of guilty to what defendant thinks is lesser included offense, such disposition of case takes place well within time required by this section, defendant succeeds in having conviction overturned, and trial is held 76 days after order overturning original conviction. Darby v. State, 476 So. 2d 1192, 1985 Miss. LEXIS 2247 (Miss. 1985).

Under the provisions of § 1-3-67 and this section, the date of a defendant's arraignment should be excluded and the date of trial should be included in determining whether a defendant has been tried more than 270 days after his arraignment in violation of § 99-17-1. Ransom v. State, 435 So. 2d 1169, 1983 Miss. LEXIS 2779 (Miss. 1983).

Under this section the time prior to arraignment is not computed to determine compliance with the statute. Perry v. State, 419 So. 2d 194, 1982 Miss. LEXIS 2136 (Miss. 1982).

In a prosecution for burglary as an habitual offender, the defendant was not deprived of his right to a speedy trial where the delay from the date of the offense to the day of trial had resulted from the fact that the grand jury was not in session when the crime was committed and from a crowded court docket and where the defendant had failed to show any prejudice resulting from the delay. Diddlemeyer v. State, 398 So. 2d 1343, 1981 Miss. LEXIS 2023 (Miss. 1981).

In a prosecution for armed robbery, the defendant's claim that he had been denied his right to a speedy trial was properly rejected by the trial court where the evidence showed that, as soon as the state had learned that the defendant was incarcerated in Louisiana, steps had been taken to have him extradited and returned to Mississippi and where the defendant's claim of prejudice resulting from the delay was invalid since he had been unable to give either the name or the whereabouts of an alleged alibi witness. Saxton v. State, 394 So. 2d 871, 1981 Miss. LEXIS 1932 (Miss. 1981).

The statute was not applicable to a defendant's claim of denial of his right to a speedy trial due to a delay of over 16 months between the alleged criminal act and his trial where the defendant had been arraigned only one week prior to trial; preindictment delays are controlled exclusively by the applicable statute of limitations. Speagle v. State, 390 So. 2d 990, 1980 Miss. LEXIS 2163 (Miss. 1980), limited, Mitchell v. State, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989).

In a prosecution for the sale of a controlled substance, the trial court erred in not dismissing the indictment where more than 270 days had passed from the time of arraignment until the date of trial. Payne v. State, 363 So. 2d 278, 1978 Miss. LEXIS 2187 (Miss. 1978).

Adjournment of court without trial of felony charged by indictment returned during term was not denial of constitutional right to speedy trial. Heard v. Clark, 156 Miss. 355, 126 So. 43, 1930 Miss. LEXIS 182 (Miss. 1930).

2. Good cause for delay.

Defendant's right to a speedy trial was not violated by the 965-day delay between his arraignment and his trial because the reason for the delay was a crowded docket and defendant offered no evidence of any actual prejudice he sustained as a result of the delay. Giles v. State, — So. 3d —, 2020 Miss. App. LEXIS 392 (Miss. Ct. App. June 23, 2020).

Good reason existed for the delay of more than three years between defendant's arrest and the first trial because of an initial belief that defendant's case could be settled, a reassignment of judges, the inability to locate a defense witness, the overseas deployment on active duty of a prosecution witness, continuances due to docket overcrowding, a lack of notice to prepare for a motion, and several joint motions to continue. Defendant was also able to provide a defense and to secure testimony from defense witnesses despite the long delay. Brown v. State, 225 So. 3d 1263, 2016 Miss. App. LEXIS 422 (Miss. Ct. App. 2016), rev'd, 222 So. 3d 302, 2017 Miss. LEXIS 169 (Miss. 2017).

State provided sufficient proof that the 236-day delay in bringing defendant to trial was because of an overcrowded docket; therefore, 236 days were excused for good cause, leaving ninety-three days, which fell below the 270-day statutory requirement, and defendant's statutory right to a speed trial was not violated. Clark v. State, 14 So. 3d 779, 2009 Miss. App. LEXIS 486 (Miss. Ct. App. 2009).

Defendant's right to a speedy trial under Miss. Code Ann. § 99-17-1 (Rev. 2007) was not violated by the 603 days that elapsed between his arraignment and his trial on murder charges because the court found sufficient good cause shown for each of the continuances granted by the trial court. Defendant's various continuances tolled the time from January 24, 2005, until June 26, 2006, resulting in no speedy trial violations, and the trial court found that the delays were actually for defendant's benefit. Smith v. State, 977 So. 2d 1227, 2008 Miss. App. LEXIS 157 (Miss. Ct. App. 2008).

While the defendant stated that his right to a speedy trial under Miss. Code Ann. § 99-17-1 was violated and that counsel was ineffective in failing to request a speedy trial, defendant however provided no information as to whether good cause was shown for the delay or whether the trial court granted any continuances; thus, he failed to present to any viable argument or any authority in support of his argument that his trial counsel was defective for failing to file a motion for a speedy trial, and therefore his counsel was not ineffective. Golden v. State, 968 So. 2d 378, 2007 Miss. LEXIS 530 (Miss. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797, 2006 Miss. LEXIS 49 (Miss.), cert. denied, 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127 (U.S. 2006).

Where approximately 1,015 days passed between the date of defendant's arraignment and trial and the prosecution conceded responsibility for less than 270 days of that time, absent additional evidence showing that the delay was not for good cause, the appellate court deferred to the trial court's finding that good cause existed for the delay. Lawrence v. State, 928 So. 2d 894, 2005 Miss. App. LEXIS 745 (Miss. Ct. App. 2005).

3. Delay attributed to defendant.

Defendant's statutory speedy-trial right was not violated based on not being tried in 270 days because defendant requested numerous continuances, and the trial court found that those requests were well-taken; thus, good cause existed for the 1,548 days that were attributable to the continuances granted to the defense, and, after deducting that number of days from the statutory time calculation, 198 days remained between defendant's arraignment and his trial. Perry v. State, 233 So. 3d 750, 2017 Miss. LEXIS 224 (Miss. 2017).

In a robbery case, defendant's right to a speedy trial under this statute was not violated, even though the trial was held past the 270-day requirement, because a majority of the elapsed time was attributable to defendant; inter alia, he made no demand for a speedy trial while incarcerated in Georgia, the delay resulting from two continuances was counted against defendant, other delays were due to the State's attempt to negotiate a plea deal, and defendant could not benefit from skipping trial and then complaining that he was denied a speedy trial. McCormick v. State, 183 So. 3d 898, 2015 Miss. App. LEXIS 676 (Miss. Ct. App. 2015).

Defendant's right to a speedy trial was not violated, despite 626 days between arraignment and trial, as new counsel needed to prepare. Ames v. State, 191 So. 3d 746, 2015 Miss. App. LEXIS 516 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 207, 2016 Miss. LEXIS 214 (Miss. 2016).

Defendant's right to a speedy trial was not violated because defendant neither alleged prejudice to the defense of the charge against defendant, nor did defendant demonstrate that defendant had suffered anxiety from the charge. Furthermore, the record reflected that the majority of the delay was attributable to defendant as the trial was twice continued due to defense counsel's illness, and defendant signed both continuance orders, waiving the right to a speedy trial. Jackson v. State, 121 So. 3d 313, 2013 Miss. App. LEXIS 571 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 260 (Miss. 2014).

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591, 2009 Miss. App. LEXIS 525 (Miss. Ct. App. 2009).

Defendant in a capital murder trial was not denied his right to a speedy trial where he filed three motions for continuance, sought to dismiss his counsel on several occasions, and filed several motions pro se because the length of delay did not exceed the 270-day benchmark under Miss. Code Ann. § 99-17-1 and because the delay was largely attributable to the defendant and somewhat attributable to a crowded docket. Scott v. State, 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008), cert. denied, 559 U.S. 941, 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205 (U.S. 2010).

In a driving under the influence case, the circuit court's denial of defendant's statutory speedy-trial claim was supported by substantial, credible evidence because defendant was re-indicted, an event which he admittedly expected, and defendant was not located until his arrest; that delay was attributable to defendant because he failed to surrender himself to the State's custody. Following defendant's re-indictment, only 141 days passed until trial. Murray v. State, 967 So. 2d 1222, 2007 Miss. LEXIS 618 (Miss. 2007).

Defendant's convictions for selling cocaine were upheld where there was no evidence to find that defendant had gone beyond the 270-day deadline; any delay that defendant suffered was caused by defendant's criminal actions in Indiana, being incarcerated in another state, and the extradition process. Hall v. State, 984 So. 2d 278, 2007 Miss. App. LEXIS 686 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 288 (Miss. 2008).

Defendant's claim that right to speedy trial was violated was rejected because, even as late as the day of trial, defendant did not want a speedy trial, and what defendant wanted was a dismissal of the charges against him; moreover, part of the reasons for delays in the case was defendant's own unwillingness to cooperate with defense counsel. Guice v. State, 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss.), cert. denied, 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515, 2007 U.S. LEXIS 12594 (U.S. 2007).

Where a total of 371 days transpired between the date of appellant's arraignment and the date of trial, appellant's right to a speedy trial was not violated under the 270-day rule, because 247 days were chargeable to appellant due to a change of lawyers and appellant's failure to appear to enter a guilty plea. Brunson v. State, 944 So. 2d 922, 2006 Miss. App. LEXIS 926 (Miss. Ct. App. 2006).

Defendant was not denied his statutory right to a speedy trial where delays between September 20, 2001, and November 30, 2001, were due to defendant or to the death of defendant's attorney's wife, and those days did not count against the State. The trial judge attributed the delay between November 30, 2001, and June 18, 2002, to an overcrowded docket and another criminal trial proceeding against defendant. Bindon v. State, 926 So. 2d 222, 2005 Miss. App. LEXIS 701 (Miss. Ct. App. 2005).

Continuances for good cause covered a period of 350 days which, when subtracted from the total delay of defendant's trial of 393 days, resulted in a delay counted against the State of 43 days; accordingly, defendant was tried within the 270-day statutory limit. Stark v. State, 911 So. 2d 447, 2005 Miss. LEXIS 458 (Miss. 2005).

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245, 2005 Miss. App. LEXIS 476 (Miss. Ct. App. 2005).

There was no violation of defendant's statutory right to a speedy trial under Mississippi's speedy trial statute, Miss. Code Ann. § 99-17-1, because defendant was responsible for much of the extraordinary 37-month lapse of time between his arrest and his trial due to his failure to provide necessary documentation to the hospital for his mental examination, his preparation for trial, and the illness of his counsel. Also defendant failed to assert his right to a speedy trial and to show any real prejudice that outweighed any delay resulting from the trial court's congested schedule. Jones v. State, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

Where there were considerably more than 270 days between the date when arraignment was waived and the beginning of trial, there was no violation of the statutory right to a speedy trial; although the trial judge himself may have taken more time to review the records than was absolutely necessary, defendant's seeking that review and the trial court's granting it were sufficient reasons to consider that part of the delay to have been the responsibility of defendant himself. Peters v. State, 864 So. 2d 983, 2004 Miss. App. LEXIS 16 (Miss. Ct. App. 2004).

Defendant's statutory right to a speedy trial was not violated where 67 of the 339 days before he was brought to trial were attributed to the request for a psychiatric evaluation and where defense counsel declined an offer by the trial court to reschedule the trial date to an earlier date that would have fallen within the 270-day requirement. Bell v. State, 847 So. 2d 880, 2002 Miss. App. LEXIS 558 (Miss. Ct. App. 2002), cert. denied, 847 So. 2d 866, 2003 Miss. App. LEXIS 602 (Miss. Ct. App. 2003).

Where defendant did not pursue his motion for a speedy trial until the trial court began the sentencing phase, at which time the trial court held the motion was moot since trial had already been concluded, and defendant had multiple changes of attorneys representing him, the delay was charged to defendant; thus, defendant was not denied his right to a speedy trial. Craft v. State, 832 So. 2d 467, 2002 Miss. LEXIS 313 (Miss. 2002).

Defendant's conviction of armed robbery was affirmed where the speedy trial, improper testimony and impeachment, jury instruction, and weight of the evidence issues that she raised on appeal had no merit; defendant's right to a speedy trial under Miss. Code Ann. § 99-17-1 was not implicated because only 162 days of the total time that transpired due to continuances could be counted towards the 270 days within which an accused was to brought to trial under the statute. Jones v. State, 846 So. 2d 1041, 2002 Miss. App. LEXIS 688 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 583 (Miss. Ct. App. 2003).

State sufficiently met the burden of establishing good cause for the delays of defendant's trial as the delays were caused by defendant, defendant did not assert his right to a speedy trial until five days before trial, there was no prejudice because of delays, and the State successfully rebutted the presumption of prejudice. Wheeler v. State, 826 So. 2d 731, 2002 Miss. LEXIS 290 (Miss. 2002).

Defendant's statutory right to a speedy trial was not violated when the delay was attributable to defendant, who was charged with aggravated assault and kidnapping. Russell v. State, 832 So. 2d 551, 2002 Miss. App. LEXIS 251 (Miss. Ct. App.), cert. denied, 832 So. 2d 533, 2002 Miss. App. LEXIS 782 (Miss. Ct. App. 2002).

Trial began 379 days after one defendant's arraignment and 330 days after the other defendant's arraignment, but defendants were responsible for 238 days of delay between the times of their arraignments and trial; thus, the number of days awaiting trial was well below the 270-day threshold dictated by the Mississippi speedy trial statute and neither defendant's statutory right to a speedy trial was violated. Collins v. State, 817 So. 2d 644, 2002 Miss. App. LEXIS 313 (Miss. Ct. App. 2002).

Defendant's claim that the State failed to bring him to trial within the 270-day period prescribed in Miss. Code Ann. § 99-17-1 was without merit, where the delay in bringing the case to trial was a result of defendant's own actions and inactions. Poole v. State, 826 So. 2d 1222, 2002 Miss. LEXIS 121 (Miss. 2002).

There was no violation of the defendant's statutory right to a speedy trial, notwithstanding a 427-day delay between arraignment and trial, where 162 days of the delay were caused by the defendant's multiple changes of counsel. Beckum v. State, 2000 Miss. App. LEXIS 568 (Miss. Ct. App. Dec. 5, 2000), rev'd, 786 So. 2d 1060, 2001 Miss. LEXIS 155 (Miss. 2001).

Where the delays in defendant's trial resulted from numerous continuances due to attorneys' withdrawals, the defendant's skipping bond, and a psychiatric evaluation, none of that time could be charged to the state. Elder v. State, 750 So. 2d 540, 1999 Miss. App. LEXIS 340 (Miss. Ct. App. 1999).

The defendant was not denied his right to speedy trial under this section where delays beyond the allowed 270 days were caused by his requests for continuances, his motions, and his submission to a mental evaluation pursuant to court order.

Snow v. State, 735 So. 2d 1094, 1999 Miss. App. LEXIS 121 (Miss. Ct. App. 1999).

There was no violation of the defendant's right to a speedy trial where delays in excess of 270 days were caused by the defendant's volitional change of attorneys and his second attorney's subsequent motion to withdraw based on the fact that the defendant had lost faith in him. Beckum v. State, 1999 Miss. App. LEXIS 91 (Miss. Ct. App.), reaff'd, 1999 Miss. App. LEXIS 722 (Miss. Ct. App. Mar. 9, 1999).

The defendant was not denied his right to a speedy trial, notwithstanding a delay of about 915 days from his arraignment to the commencement of trial, where he was tried within the 270 day limit after deduction of the time which lapsed due to the court's consideration of various defense motions. Brewer v. State, 725 So. 2d 106, 1998 Miss. LEXIS 345 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365, 1999 U.S. LEXIS 2032 (U.S. 1999).

No violation of defendant's statutory right to speedy trial occurred, absent any oppressive conduct by state, even if trial was delayed by more than 270 days; most delay was occasioned by defendant's own motions or inaction, and defendant was in fact tried in less than eight months after arraignment. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Any delay over 125 days that elapsed between date of arraignment and first trial date were attributable to defendant for purposes of statutory right to speedy trial, where defendant fled jurisdiction, fought extradition, and was uncooperative with attorney when present. Herring v. State, 691 So. 2d 948, 1997 Miss. LEXIS 37 (Miss. 1997).

Delay in finding and preparing new experts after trial court issued subpoena duces tecum against defense expert and expert withdrew was not chargeable to state for purposes of 270-day speedy trial period, where defendant did not challenge subpoena issue independently of 270-day speedy trial motion. Hull v. State, 687 So. 2d 708, 1996 Miss. LEXIS 687 (Miss. 1996).

A defendant was not denied his statutory or constitutional rights to a speedy trial, even though he was arrested on February 13, 1989, arraigned May 5, 1989, and his trial began March 5, 1990, where the defendant filed 15 motions before he was brought to trial which substantially contributed to the delay, the record supported the State's position that it could not try the case until the issues of change of venue and admissibility of forensic DNA analysis had been resolved, and the defendant did not contend that the delay either diminished his defense or strengthened the State's evidence, but stated only that he suffered "a great deal of anxiety." Polk v. State, 612 So. 2d 381, 1992 Miss. LEXIS 820 (Miss. 1992).

A defendant was not denied his right to a speedy trial under this section, even though 441 days elapsed between his arrest and trial, where the defendant was never arraigned, and the record reflected that the defendant did not want a speedy trial and it was mutually agreed that neither side would push for a speedy trial. Mitchell v. State, 609 So. 2d 416, 1992 Miss. LEXIS 607 (Miss. 1992).

A defendant's constitutional and statutory rights to a speedy trial were not violated, even though the delay between the defendant's arrest and trial was 378 days and the delay between arraignment and trial was 370 days, where only one of the delays-a continuance requested by the State solely for its prosecutorial tactical advantage-was attributable to the State, and, after calculating the delays caused by the defendant, he came to trial 164 days after his arrest and 156 days after his waiver of arraignment. Ross v. State, 605 So. 2d 17, 1992 Miss. LEXIS 419 (Miss. 1992).

A defendant's right to a speedy trial under this section was not violated, even though his trial occurred 347 days after his arraignment, where all of the delays were prompted by the defendant and none were attributable to the State. Baine v. State, 604 So. 2d 258, 1992 Miss. LEXIS 350 (Miss. 1992).

A defendant's statutory right to a speedy trial under this section was not violated, even though his trial occurred 460 days after his arrest, where the trial occurred only one day after his arraignment. Additionally, the defendant's constitutional right to a speedy trial was not violated where the defendant moved for 2 continuances during the period between the indictment and the trial which resulted in 181 days of time lost, much of the remaining delay could be attributed to 5 changes in the defendant's attorney, the delay was for good cause to allow his counsel sufficient time to prepare for trial, there were no deliberate attempts by the State to cause a delay to hamper the defendant's ability to prepare a defense, and there was no showing of prejudice to the defendant. Wiley v. State, 582 So. 2d 1008, 1991 Miss. LEXIS 364 (Miss. 1991).

State showed good cause for delay in trial held 293 days after initial arraignment, where defendant acquiesced in and initiated much of plea bargaining that caused resulting delay and State made every effort to reach plea agreement and relied on defendant's indication that such agreement was forthcoming and acceptable. Reed v. State, 506 So. 2d 277, 1987 Miss. LEXIS 2483 (Miss. 1987).

Delay resulting from withdrawal of attorney for defendant is excluded from time within which defendant must be brought to trial where defendant has acquiesced in withdrawal. Nations v. State, 481 So. 2d 760, 1985 Miss. LEXIS 2374 (Miss. 1985).

The trial court erred in granting the motions of two defendants to dismiss the indictments against them for failure to grant them a speedy trial where, although the period between arraignment and the filing of the motions was 294 days, continuances totalling approximately 49 days had been granted without protest or objection by the defendants and without their requesting trial during this period of time. State v. Sistrunk, 404 So. 2d 564, 1981 Miss. LEXIS 2237 (Miss. 1981).

A defendant was not denied his right to a speedy trial where, although the trial took place 385 days after the indictment, most of the delay between the date of the indictment and the date of trial resulted from the difficulty in getting a psychiatric examination at the state institution as requested by the defense. Moreover, the defendant was not arraigned until the day the trial began. Gator v. State, 402 So. 2d 316, 1981 Miss. LEXIS 2178, 1981 Miss. LEXIS 2526 (Miss. 1981).

In a prosecution for burglary, the trial court properly overruled defendant's motion for dismissal on speedy trial grounds, even though defendant was tried 584 days after his arraignment, where defendant's original attorney was unable to appear because of a death in his family, where defendant's court-appointed attorney requested a continuance on the grounds that he needed more time to prepare, where the prosecution requested a continuance because of the absence of a material witness, and where defendant was finally tried during the court's fourth term after arraignment; good cause was shown for the delay and defendant's constitutional right to a speedy trial was not violated. Durham v. State, 377 So. 2d 909, 1979 Miss. LEXIS 2525 (Miss. 1979).

4. Delay attributed to State.

Defendant was not entitled to dismissal for a speedy trial violation because (1) the State demonstrated good cause for any delay attributable to the State, and (2) defendant did not demonstrate that defendant was prejudiced. Franklin v. State, 136 So. 3d 1021, 2014 Miss. LEXIS 123 (Miss. 2014).

The court would reverse and remand to the trial court for a hearing to determine whether the defendant was prejudiced by the delay in his trial where (1) the delay between his arraignment and trial included 320 days that ran against the state, (2) there were no continuances on the record with regard to the overcrowded docket and there was no evidentiary basis, such as the docket calendars, to support the exclusion of any of the delay due to an overcrowded docket, and (3) the defendant filed a motion to dismiss his indictment for failure to provide him a speedy trial well within the 270 day period. Frazier v. State, 739 So. 2d 443, 1999 Miss. App. LEXIS 203 (Miss. Ct. App. 1999).

A defendant's statutory right to a speedy trial was violated where no motion for a continuance was ever made by either the defendant or the State, the only occurrence between the arraignment and the trial which would toll the 270-day period was the defendant's motion to suppress and, even after discarding the days when the motion was being considered, more than 270 days passed between the arraignment and the trial, and there was no showing by the State in the record of good cause for the delay. Ford v. State, 589 So. 2d 1261, 1991 Miss. LEXIS 799 (Miss. 1991).

A defendant was entitled to a reversal of his conviction and a discharge for violation of his right to be tried within 270 days of his arraignment where 75 days elapsed from the date of the defendant's waiver of arraignment to the first indictment until the date the indictment was nol prossed, 144 days elapsed from the date the defendant was arraigned for the same offense under a second indictment to the date of the first motion to quash the indictment for failure to comply with the statutory 270-day rule, 174 days elapsed from the date of the arraignment to the date on which the second motion to quash was made, the defendant was tried 341 days after the second arraignment, there was no motion made by the defendant for a continuance or any reason on his part to cause any delay, and nothing appeared in the record either excusing or justifying the delay, even though the State did not ask for any delay except that occasioned by the nolle prosequi. Moore v. State, 556 So. 2d 1031, 1990 Miss. LEXIS 14 (Miss. 1990).

Delay of almost 10 months in bringing parolee arrested on burglary charges to trial following parolee's demand for speedy trial does not deny parolee speedy trial rights under this section where only 47 days elapse from arraignment to trial but does violate constitutional speedy trial right where delay has been caused by state and parolee, whose parole has been revoked as result of arrest, is prejudiced by being ineligible for parole and disqualified from participating in rehabilitation programs because of detainer filed in connection with burglary arrest, and by being unable to properly locate witnesses to substantiate defense that someone else stole car and performed burglary. Bailey v. State, 463 So. 2d 1059, 1985 Miss. LEXIS 1875 (Miss. 1985).

In a prosecution for embezzlement defendant's conviction of such crime would be reversed on the ground that the defendant had been denied his right to a speedy trial, where the delay from the time of defendant's having become an accused until trial was about 19 months, where the prosecutor offered no excuse for the delay, and where the defendant had sent a written request by mail to the sheriff asking for appointed counsel and a speedy trial. Perry v. State, 419 So. 2d 194, 1982 Miss. LEXIS 2136 (Miss. 1982).

In a prosecution for the rape of a female child under the age of 12-years, the trial judge erred in failing to dismiss the case for failure to bring the defendant to trial within 270 days of arraignment where there was no good cause shown for the delay and where the failure to conduct a psychiatric examination of defendant as ordered by the court was attributable to the state. Selvidge v. Taylor, 383 So. 2d 489, 1980 Miss. LEXIS 2212 (Miss. 1980).

Where the state knows the identity of the accused, has the accused in custody, obtains a confession, and holds the accused in a penitentiary for a period of over eight years, during which time the accused has suffered many disadvantages resulting from the delay, then the delay is vexatious, capricious and oppressive, and the accused has been denied a speedy trial as contemplated by the Constitution. Jones v. State, 250 Miss. 186, 164 So. 2d 799, 1964 Miss. LEXIS 454 (Miss. 1964).

5. State's burden.

Five-year period between mistrial on defendant's murder charge and entry of nolle prosequi of indictment, which was followed more than twenty years later by reindictment and conviction, did not violate defendant's right to speedy trial, though length of such period was presumptively prejudicial to defendant; defendant never asserted his speedy trial rights, defendant acquiesced in delay caused by state agency's assistance to his defense without prosecution's knowledge, and defense was not prejudiced, as all material evidence from prior proceedings was preserved. De La Beckwith v. State, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

When length of pretrial delay is presumptively prejudicial, burden of persuasion is on state to show that delay did not prejudice defendant and violate his

speedy trial rights. De La Beckwith v. State, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Where accused is not tried within 270 days of arraignment, state has burden of establishing good cause for delay, as accused is under no duty to bring himself to trial. Herring v. State, 691 So. 2d 948, 1997 Miss. LEXIS 37 (Miss. 1997).

Where accused is not tried within 270 days of arraignment, State bears burden of establishing good cause for delay. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

Where accused is not tried within 270 days of arraignment, state bears burden, under speedy trial statute, of establishing good cause for the delay. Skaggs v. State, 676 So. 2d 897, 1996 Miss. LEXIS 317 (Miss. 1996).

For purpose of calculating period of time between a defendant's arraignment and trial for purposes of determining whether defendant's statutory right to speedy trial has been violated, state bears burden of showing good cause for delay between arraignment and trial if record is silent as to reasons. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

Where a defendant contended that his statutory and constitutional rights to a speedy trial were violated because he was tried more than 600 days after his arrest and arraignment, the State bore the burden of positively demonstrating that the backlog of drug cases in the court system and the state crime lab, which were alleged to be the reasons for the delay, actually caused the delay in that particular case. McGee v. State, 608 So. 2d 1129, 1992 Miss. LEXIS 204 (Miss.), modified, (Miss. 1992).

Where the facts reflect that the accused's trial did not commence within 270 days of arraignment, the State bears the burden of establishing that there was good cause for delay. Vickery v. State, 535 So. 2d 1371, 1988 Miss. LEXIS 571 (Miss. 1988).

6. Commencement of period.

Defendant's statutory right to a speedy trial was not violated because his right began when he was arraigned on April 4, 2017, and he was tried on September 12, 2017–161 days later. Sullivan v. State, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Defendant's statutory speedy trial right was not violated where he was tried five days after his arraignment, even though the trial occurred 554 days after his arrest. Brengettcy v. State, 794 So. 2d 987, 2001 Miss. LEXIS 219 (Miss. 2001).

The starting point of the 270-day period for the defendant's trial was the date of his reindictment rather than the date of his original indictment, which was quashed, since the defendant failed to put a date of arraignment in the record that the court could consider in deciding if his 270-day right to a speedy trial had been violated. Forrest v. State, 782 So. 2d 1260, 2001 Miss. App. LEXIS 124 (Miss. Ct. App. 2001).

In a prosecution for attempting to intimidate a witness, the 270-day period under this section began to run on the date of arraignment on the indictment for attempting to intimidate a witness, rather than the date of arraignment on a prior indictment for aggravated assault, even though both indictments arose out of the same transaction and occurrence; even if the defendant had been reindicted on the same offense, the 270-day period would have commenced on the date of arraignment of the reindictment. Corley v. State, 584 So. 2d 769, 1991 Miss. LEXIS 480 (Miss. 1991).

For constitutional purposes, the right to a speedy trial attaches and time begins to run with arrest. The statutory right to a speedy trial set forth in this section attaches with arraignment; calculation of statutory time requires exclusion of the date of arraignment and inclusion of the date of trial and weekends, unless the last day of the 270-day period falls on Sunday. Any delays in prosecution attributable to a defendant under either the constitutional or statutory scheme tolls the running of time. Any continuances for "good cause" will toll the running of time unless "the record is silent regarding the reason for delay," in which case "the clock ticks against the State because the State bears the risk of non-persuasion on the good cause issue." The statutory 270-day rule is satisfied once the defendant is brought to trial, even if that trial results in a mistrial. Handley v. State, 574 So. 2d 671, 1990 Miss. LEXIS 857 (Miss. 1990), op. withdrawn, sub. op., 1991 Miss. LEXIS 235 (Miss. Apr. 16, 1991).

A defendant's right to a speedy trial was not violated, even though the defendant was tried for capital murder more than 270 days after his original arraignment on an indictment for murder less than capital, where the defendant was reindicted for capital murder and was tried well within the 270-day rule from the time of the arraignment on the capital murder charge. Galloway v. State, 574 So. 2d 1, 1990 Miss. LEXIS 895 (Miss. 1990).

7. Waiver of right.

Defendant showed no violation of the statutory right to a speedy trial because defendant's failure to assert the right until appeal waived the right. Williams v. State, 291 So. 3d 418, 2020 Miss. App. LEXIS 55 (Miss. Ct. App. 2020).

Defendant waived his right to being tried within 270 days of arraignment under this section because he failed to assert his right until the day before trial. Ford v. State, 281 So. 3d 1109, 2019 Miss. App. LEXIS 255 (Miss. Ct. App. 2019).

Defendant waived his statutory right to a speedy trial, where defendant, who was arraigned in November 2012 but not tried until February 2016, failed to assert his statutory right until October 2015, approximately three years after his arraignment, and defendant's trial commenced only four months after he raised the issue. Collins v. State, 232 So. 3d 739, 2017 Miss. App. LEXIS 297 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 525 (Miss. 2017), cert. denied, 229 So. 3d 123, 2017 Miss. LEXIS 493 (Miss. 2017).

As defendant did not move to dismiss the charges based on a statutory speedy trial violation until the morning of trial–approximately 595 days after arraignment–his motion was properly dismissed because he was well outside the 270-day time frame to raise the violation of Miss. Code Ann. § 99-17-1. Whitaker v. State, 114 So. 3d 725, 2012 Miss. App. LEXIS 481 (Miss. Ct. App. 2012), cert. denied, 2013 Miss. LEXIS 331 (Miss. June 6, 2013).

Since defendant failed to assert his statutory right to a speedy trial, and since he showed no prejudice in the ability to conduct his defense, defendant acquiesced in the delay in trying him and waived his right to complaint that his statutory right to a speedy trial was violated. McBride v. State, 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's conviction for murder was appropriate because he filed his motion to dismiss 566 days after he waived arraignment. Accordingly, he waived his right to complain about not being tried within 270 days because he neither requested nor asserted his right to a speedy trial within that time. Williams v. State, 53 So. 3d 761, 2009 Miss. App. LEXIS 947 (Miss. Ct. App. 2009), rev'd, 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's claim that his right to a speedy trial under Miss. Code Ann. § 99-17-1 was violated was without merit because his arraignment hearing was on August 18, 2005 and he filed his first motion to dismiss for failure to provide a speedy trial on September 24, 2007, and the court had held if a defendant failed to raise the statutory right to a speedy trial within 270 days of his arraignment, he acquiesced to the delay. Ray v. State, 27 So. 3d 416, 2009 Miss. App. LEXIS 496 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Although a defendant's trial occurred outside the 270-day period of Miss. Code Ann. § 99-17-1, defendant failed to raise his speedy trial right during the 270-day period. He therefore acquiesced in the delay. Loi Quoc Tran v. State, 999 So. 2d 415, 2008 Miss. App. LEXIS 453 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 47 (Miss. 2009), cert. denied, 2009 Miss. LEXIS 35 (Miss. Jan. 22, 2009).

Defendant's right to a speedy trial was not violated because, while a delay did exist, defendant failed to assert his right to a speedy trial, did not object to any delays, other than filing the day before trial a motion to dismiss for failure to provide a speedy trial, and failed to show that he suffered any actual prejudice due to the delay. Roach v. State, 938 So. 2d 863, 2006 Miss. App. LEXIS 102 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Defendant's motion was filed well after the expiration of the 270 days of the arraignment and he failed to demonstrate any prejudice from the delay occurring between his arraignment and trial. Therefore, even though a clear violation of Miss. Code Ann. § 99-17-1 occurred, he waived his right to complain about the denial of his statutory right to a speedy trial. Guice v. State, 952 So. 2d 187, 2006 Miss. App. LEXIS 72 (Miss. Ct. App. 2006), aff'd, 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Although a clear violation of Miss. Code Ann. § 99-17-1 occurred where a total of 596 days passed from the time defendant was initially arraigned to the commencement of trial, defendant waived his right to complain about the denial of his statutory right to a speedy trial since he did not assert this right until well after the deadline had passed, and even then, failed to obtain a ruling on the motion; defendant also failed to show any prejudice. Anderson v. State, 874 So. 2d 1000, 2004 Miss. App. LEXIS 188 (Miss. Ct. App. 2004).

Defendant failed to raise, within 270 days of his arraignment, the issue that his right to a speedy trial had been violated under Miss. Code Ann. § 99-17-1 and, therefore, acquiesced to the delay. Mims v. State, 856 So. 2d 518, 2003 Miss. App. LEXIS 377 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 522 (Miss. 2003).

Defendant's motion for post-conviction relief was properly dismissed where his guilty plea to false pretenses waived his right to a speedy trial under Miss. Code Ann. § 99-17-1. Hinton v. State, 812 So. 2d 255, 2002 Miss. App. LEXIS 153 (Miss. Ct. App. 2002).

When a defendant asserts a violation of the 270 day statute, the threshold question of whether the defendant made some sort of timely assertion of his right to be tried within 270 days is critical to consideration of the issue on the merits; thus, a prolonged failure to raise the right to be tried speedily can constitute a waiver of the statutory right to be tried within 270 days of arraignment. Little v. State, 744 So. 2d 339, 1999 Miss. App. LEXIS 314 (Miss. Ct. App. 1999).

A defendant was not denied his statutory right to a speedy trial, even though 344 elapsed from the date of arraignment to the date of trial, where the defendant waived his statutory speedy trial rights for a 229-day period due to his agreement to the trial setting. McGhee v. State, 657 So. 2d 799, 1995 Miss. LEXIS 329 (Miss. 1995).

A valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial, including the right to a speedy trial, whether of constitutional or statutory origin. Anderson v. State, 577 So. 2d 390, 1991 Miss. LEXIS 180 (Miss. 1991).

8. On retrial.

Rule contained in Miss. Code Ann. § 99-17-1 that an accused be brought to trial within 270 days of his indictment unless there was good cause for delay did not apply to defendant's retrial, and thus, defendant was relegated to the constitutional speedy trial standards to argue that the delay in retrying him violated his right to a speedy trial. Stevens v. State, 2001 Miss. LEXIS 301 (Miss. Oct. 31, 2001).

Where the state made a good faith mistake in ordering a nolle prosequi after the first indictment, the time for speedy trial commenced at the time of the arraignment of the defendant on his re-indictment. State v. Shumpert, 723 So. 2d 1162, 1998 Miss. LEXIS 563 (Miss. 1998).

A defendant was not denied his right to a speedy trial, even though his retrial did not commence until 383 days after the reversal of his original conviction, where part of the delay could be attributed to the logistics of a change in venue, the defendant apparently did not assert his right to a speedy trial, and there was no prejudice, particularly since it was in the defendant's best interest that the retrial be delayed as both parties searched to secure the attendance of a witness whom the defendant claimed was critically important to have as a live eyewitness at trial; the delay did not violate this section since the 270-day rule does not apply to retrials.

Mitchell v. State, 572 So. 2d 865, 1990 Miss. LEXIS 722 (Miss. 1990).

This section requires only that indictments be tried within 270 days of arraignment, and, where the first trial results in a mistrial, the statute is not applicable to require that the retrial take place within 270 days of the first trial. Kinzey v. State, 498 So. 2d 814, 1986 Miss. LEXIS 2849 (Miss. 1986).

Defendant's speedy trial rights were not violated by his retrial approximately 352 days after mistrial where some of the delay was caused by overcrowded dockets necessitating continuances, the defendant failed to assert his right until approximately 3 weeks before his retrial was scheduled to begin, and defendant failed to show prejudice resulting from the delay. Kinzey v. State, 498 So. 2d 814, 1986 Miss. LEXIS 2849 (Miss. 1986).

If a mistrial results, or if a case is reversed on appeal for retrial, compliance with this section is satisfied; the time for retrial then becomes a matter of discretion with the trial court to be measured by the constitutional standards of reasonableness and fairness under the constitutional right to a speedy trial. Thus, in a prosecution for murder in which a conviction was obtained after a fourth retrial, the defendant was not denied her right to a speedy trial by a delay of 475 days between the filing of the Supreme Court mandate and the trial where the delay was attributable to continuances which had been granted and where the defendant neither asserted a right to a speedy trial nor alleged any prejudice that flowed from the trial delay. Carlisle v. State, 393 So. 2d 1312, 1981 Miss. LEXIS 1899 (Miss. 1981).

The trial court properly denied a motion that the defendant be discharged because more than 270 days had passed since his arraignment where the delay resulted from the reversal of his conviction on appeal and remand for a new trial. Atkinson v. State, 392 So. 2d 205, 1980 Miss. LEXIS 2153 (Miss. 1980).

9. Continuances; generally.

Defendant's conviction for the possession of methamphetamine precursors was appropriate because he was brought to trial within 275 days of his waiver of an arraignment and there was good cause shown for some of the continuances that were duly granted. There was also nothing indicating that the State exercised a deliberate attempt to sabotage the defense by delaying the trial. Houser v. State, 29 So. 3d 813, 2009 Miss. App. LEXIS 562 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

Defendant in a capital murder trial was not denied his right to a speedy trial where he filed three motions for continuance, sought to dismiss his counsel on several occasions, and filed several motions pro se because the length of delay did not exceed the 270-day benchmark under Miss. Code Ann. § 99-17-1 and because the delay was largely attributable to the defendant and somewhat attributable to a crowded docket. Scott v. State, 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008), cert. denied, 559 U.S. 941, 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205 (U.S. 2010).

In calculating the length of the delay, the court properly subtracted the period of delay attributable to a continuance caused by the state's involvement in another trial; the defense presented no evidence that some part of the basis for the state's selecting the other cases for trial was bad faith in delaying the defendant's trial. Rhyne v. State, 741 So. 2d 1049, 1999 Miss. App. LEXIS 472 (Miss. Ct. App. 1999).

A continuance caused by a change in dockets was for good cause and would not be charged to the state since the change in dockets was caused by a conflict of interest on the part of the judge, whose husband, a narcotics officer, was listed in the case as a potential witness. Williams v. State, 747 So. 2d 276, 1999 Miss. App. LEXIS 351 (Miss. Ct. App. 1999).

Continuances for good cause toll running of 270-day statutory speedy trial period, unless record is silent regarding reason for delay, and then clock ticks against state. Herring v. State, 691 So. 2d 948, 1997 Miss. LEXIS 37 (Miss. 1997).

Eighteen-month delay did not violate defendant's statutory speedy trial right, as statute was tolled for informal continuance to allow defendant to file motion for psychiatric evaluation, for informal continuance to allow defense time for trial preparation, and for formal continuance for psychiatric evaluation. Simmons v. State, 678 So. 2d 683, 1996 Miss. LEXIS 285 (Miss. 1996).

Generic continuance such as one granted "for good and sufficient cause" does not satisfy requirements for exclusion under statute governing defendant's right to speedy trial. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

Even where record contains no indication that written order of continuance was granted, statutory speedy trial clock may be tolled if state and defendant orally agree to continuance, defendant agrees to enter plea negotiations, or defense attorney fails to appear for trial because of death in family. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

The time expended as a result of a continuance sought by a codefendant because of the State's failure to comply with discovery would be counted against the State in determining whether the defendant was denied his statutory right to a speedy trial. Flores v. State, 586 So. 2d 811, 1991 Miss. LEXIS 671 (Miss. 1991).

The "bumping" of a trial due to the continuance of another criminal prosecution was "good cause" for a continuance under this section. Folk v. State, 576 So. 2d 1243, 1991 Miss. LEXIS 57 (Miss. 1991).

A finding of "good cause" for a continuance under this section is a finding of ultimate fact, and should be treated as any other finding of ultimate fact challenged on appeal, i.e., the finding will be undisturbed only where there is in the record substantial, credible evidence from which it may fairly have been made, and will ordinarily be reversed where there is a complete absence of probative evidence in the record. Folk v. State, 576 So. 2d 1243, 1991 Miss. LEXIS 57 (Miss. 1991).

A trial court did not err in refusing to delay the trial until the defendant, who was deaf, could be taught to use sign language where the court had no way of ascertaining whether the defendant would learn sign language nor the degree to which it could improve his ability to understand and communicate, the defendant was able to read, he was a high school graduate and a college student, and he was kept advised of what was being argued and what testimony was being presented during the trial. Shook v. State, 552 So. 2d 841, 1989 Miss. LEXIS 449 (Miss. 1989).

While it would be better practice for trial judge to recite in order granting continuance what cause is for continuance, this is not necessary in order that continuance toll running of time within which defendant must be brought to trial; written order reciting that motion for continuance is well taken and should be granted is equivalent of judicial determination that good cause exists for continuance. Nations v. State, 481 So. 2d 760, 1985 Miss. LEXIS 2374 (Miss. 1985).

This section, requiring that defendant be brought to trial within 270 days of arraignment, was not violated, despite 272 days having elapsed between defendant's arraignment and trial, where 23 days were deductible from the 270-day period as representing the time during which a continuance was in effect for the purpose of affording defendant a psychiatric examination. Brady v. State, 425 So. 2d 1347, 1983 Miss. LEXIS 2361 (Miss. 1983).

Although capital cases are required to be tried during the term in which the indictment is returned, unless good cause is shown to the contrary, the granting of a motion by the defendant for continuance is a matter largely within the sound discretion of the trial court, and a judgment will not be reversed because the continuance is refused unless there has been an abuse of sound discretion. King v. State, 251 Miss. 161, 168 So. 2d 637, 1964 Miss. LEXIS 337 (Miss. 1964).

The necessary time for the accused and his counsel to prepare his trial must necessarily be left largely to the sound discretion of the trial judge, bearing in mind the facts and circumstances of the particular case. Gilmore v. State, 225 Miss. 173, 82 So. 2d 838, 1955 Miss. LEXIS 572 (Miss. 1955).

Application for continuance to the next term of a murder prosecution was properly denied where the crime was committed in July, the indictment was had in October, the accused employed two attorneys the day the indictment was returned, all of the testimony involved one place and one occasion, all witnesses were available both to the state and to the accused, and apparently all testified, and the court set the case for trial a week after hearing the motion. Garner v. State, 202 Miss. 21, 30 So. 2d 413, 1947 Miss. LEXIS 235 (Miss. 1947).

The granting of a continuance of ten days between the setting of the case and the date of trial was held not an insufficient time to interview witnesses and prepare for the defense of the case where it was not shown that the witnesses were unavailable, the court remarking that a compliance with the statute would make for a more efficient administration of justice and that the failure to comply therewith was all too frequent. In that case, the indictment was returned during the September term but the case was not tried until the following February and the defendant's attorney represented him during this time. McClellan v. State, 183 Miss. 184, 184 So. 307, 1938 Miss. LEXIS 232 (Miss. 1938).

10. —At defendant's request.

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel due to a failure to file a speedy trial motion under Miss. Code Ann. § 99-17-1; there was no violation of this right because there was only a six-month delay between an arraignment and the inmate's guilty pleas, and this was mainly due to continuances filed on behalf of the inmate. Oliver v. State, 20 So. 3d 16, 2009 Miss. App. LEXIS 202 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Although the 439 days that elapsed between defendant's arraignment and trial exceeded the 270-day limit, this was not the fault of the State or of the trial court because defendant filed continuance requests that were granted based upon showings of good cause and because continuances granted to defendant tolled the running of the speedy trial statute and could not be counted against the State. Tarver v. State, 15 So. 3d 446, 2009 Miss. App. LEXIS 40 (Miss. Ct. App.), cert. denied, 15 So. 3d 426, 2009 Miss. LEXIS 398 (Miss. 2009).

The defendant's right to a speedy trial was not violated where 515 days of delay were attributable to the defendant's continuances and changing of attorneys, which left the state responsible for only 129 days of delay. Sharp v. State, 786 So. 2d 372, 2001 Miss. LEXIS 141 (Miss. 2001).

Taking into consideration the good cause delays due to crowded dockets supported by court order and the continuance granted the defense, no violation of the 270 day rule occurred. Buggs v. State, 738 So. 2d 1253, 1999 Miss. App. LEXIS 184 (Miss. Ct. App. 1999).

Continuances that are attributed to defendant stop running of statutory speedy trial clock and are deducted from total number of days before trial. Herring v. State, 691 So. 2d 948, 1997 Miss. LEXIS 37 (Miss. 1997).

For purposes of determining whether defendant's statutory right to speedy trial has been violated, continuance requested by defendant is charged to defense. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

A defendant was not denied his statutory right to a speedy trial on charges of intimidating a witness, even though 343 days elapsed between the defendant's arraignment and trial, where the trial was delayed due to a continuance granted to the defendant; the defendant's argument that the continuance did not toll the running of the statutory period on his indictment for intimidating a witness because, due to an administrative error in transferring his indictment from circuit court to county court, the continuance was not granted on the multi-count indictment for attempting to intimidate a witness but on a prior aggravated assault charge that had been dismissed by the circuit court, was without merit where the defendant did not believe when the cause was transferred to the county court that the transferred charge was for aggravated assault, and the defendant sought, and was granted, a continuance from county court while proceeding under the assumption that he was being charged with intimidating a witness. Corley v. State, 584 So. 2d 769, 1991 Miss. LEXIS 480 (Miss. 1991).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37 days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. Adams v. State, 583 So. 2d 165, 1991 Miss. LEXIS 384 (Miss. 1991).

A defendant's right to a speedy trial was not violated since this section's 270-day period was tolled from the time of the first continuance which was granted on the defendant's motion, until the date of the end of the second continuance in which the defense counsel actively participated. Arnett v. State, 532 So. 2d 1003, 1988 Miss. LEXIS 457 (Miss. 1988).

A trial court did not abuse its discretion in denying a defendant's motion for a continuance where the newly appointed defense attorney had 24 days to prepare for trial. Fisher v. State, 532 So. 2d 992, 1988 Miss. LEXIS 438 (Miss. 1988).

Refusal to grant continuance to defendant on basis of failure of state to comply with motion for discovery, made 5 months prior to trial, until day prior to trial is reversible error. McKinney v. State, 482 So. 2d 1129, 1986 Miss. LEXIS 2342 (Miss. 1986).

In a prosecution for rape, a delay of 150 days between arraignment and trial was not unreasonable where the delay was caused by two continuances, one of which was requested by the defense in order for it to complete psychological tests of the defendant and the other which was requested by the District Attorney because there was no prosecutor available. Davis v. State, 406 So. 2d 795, 1981 Miss. LEXIS 2163 (Miss. 1981), cert. denied, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324, 1982 U.S. LEXIS 2503 (U.S. 1982).

In a prosecution for felonious possession of marijuana, the trial court erred in dismissing the indictments and discharging defendants on speedy trial grounds, where one delay was requested by the state after defendants filed on the day set for trial, without notice, a motion to quash the indictment because of alleged racial discrimination in the selection of the jury's foreman, where defendants requested one continuance, and where the state requested another continuance because of the absence of its expert witness; the delays, which were granted in the absence of any objection by defendants, were entered for good cause. State v. Davis, 382 So. 2d 1095, 1980 Miss. LEXIS 1987 (Miss. 1980).

11. —At state's request.

Defendant was not denied his statutory right to a speedy trial because none of the continuances were solely attributable to the prosecution, and defendant provided no support for his self-serving assertion that the continuances were some sort of conspiracy against him. Jenkins v. State, 284 So. 3d 862, 2019 Miss. App. LEXIS 561 (Miss. Ct. App. 2019).

Period from defendant's arraignment to his trial was within the statutorily required 270 days, Miss. Code Ann. § 99-17-1, but compliance with the statute did not mean that defendant's constitutional right to a speedy trial had been respected; however, the State made its requests for continuances because it needed to secure the testimony of an essential witness. Without the witness's testimony, the State had no evidence showing that the victim was shot, killed, placed in garbage bags, and thrown into a river; because the State requested its continuances for good cause, because the delays were not egregiously protracted, and because defendant failed to show actual prejudice, defendant's right to a speedy trial was protected. Jackson v. State, 924 So. 2d 531, 2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Where the length between the defendant's arrest and first trial was approximately one year and the state asserted that a continuance was necessary because the state was looking for a material witness, the continuance was not requested in order to prejudice the defendant from being tried within 270 days; rather, it was a legitimate action on the part of the prosecution to submit to the jurors a complete picture of what transpired the evening that the crime occurred. Holiday v. State, 1999 Miss. App. LEXIS 15 (Miss. Ct. App. Jan. 26, 1999), op. withdrawn, sub. op., 739 So. 2d 394, 1999 Miss. App. LEXIS 176 (Miss. Ct. App. 1999).

In a prosecution for rape, a delay of 150 days between arraignment and trial was not unreasonable where the delay was caused by two continuances, one of which was requested by the defense in order for it to complete psychological tests of the defendant and the other which was requested by the District Attorney because there was no prosecutor available. Davis v. State, 406 So. 2d 795, 1981 Miss. LEXIS 2163 (Miss. 1981), cert. denied, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324, 1982 U.S. LEXIS 2503 (U.S. 1982).

In a prosecution for felonious possession of marijuana, the trial court erred in dismissing the indictments and discharging defendants on speedy trial grounds, where one delay was requested by the state after defendants filed on the day set for trial, without notice, a motion to quash the indictment because of alleged racial discrimination in the selection of the jury's foreman, where defendants requested one continuance, and where the state requested another continuance because of the absence of its expert witness; the delays, which were granted in the absence of any objection by defendants, were entered for good cause. State v. Davis, 382 So. 2d 1095, 1980 Miss. LEXIS 1987 (Miss. 1980).

12. —Due to court congestion.

Defendant's conviction was affirmed because while it was clear that defendant was not tried within 270 days as required under Miss. Code Ann. § 99-17-1, it was also clear that the reason for the delay was the congested trial docket. Moreover, defendant showed no prejudice to his ability to mount a defense as a result of the delay. Johnson v. State, 69 So. 3d 10, 2010 Miss. App. LEXIS 229 (Miss. Ct. App. 2010), aff'd, 68 So. 3d 1239, 2011 Miss. LEXIS 335 (Miss. 2011).

Taking into consideration the good cause delays due to crowded dockets supported by court order and the continuance granted the defense, no violation of the 270 day rule occurred. Buggs v. State, 738 So. 2d 1253, 1999 Miss. App. LEXIS 184 (Miss. Ct. App. 1999).

For speedy trial purposes, crowded docket will not automatically suffice to establish good cause for delay. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

Upon proper showing by State in response to defendant's timely motion to dismiss because of alleged 270-day violation, docket congestion can be proper basis for good cause when supported by facts of particular case. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

Defendant's statutory right to be tried within 270 days of arraignment was not violated, even though he was tried 370 days after his arraignment; "good cause" for delay arose from congested court docket in county in which defendant was tried, and defendant did not demand speedy trial until day his case was set for trial. Walton v. State, 678 So. 2d 645, 1996 Miss. LEXIS 192 (Miss. 1996).

For purposes of determining whether defendant's statutory right to speedy trial has been violated, crowded court dockets are good cause for delay only if court actually grants continuance on this basis. Johnson v. State, 666 So. 2d 784, 1995 Miss. LEXIS 616 (Miss. 1995).

A trial court had good cause for granting a continuance from Monday, which was the 270th day of court, to Friday of that week due to the court's heavy docket, and therefore the 270-day rule under this section was not violated. Carson v. State, 607 So. 2d 1132, 1992 Miss. LEXIS 537 (Miss. 1992).

A defendant's statutory right to a speedy trial was not violated, even though 338 days elapsed between the defendant's original arraignment and the first day of his trial, where the defendant was granted a 63-day continuance during that time, and the case was continued for 37 days due to a congested docket. Additionally, the defendant's constitutional right to a speedy trial was not violated, even though 456 days elapsed between the time the defendant was arrested and the first day of his trial, where a significant part of the delay was attributable to the defendant, the balance of the delay was attributable to mere negligence and court congestion, and the defendant failed to assert his right to a speedy trial until the day the trial was scheduled. Adams v. State, 583 So. 2d 165, 1991 Miss. LEXIS 384 (Miss. 1991).

A defendant's right to a speedy trial was violated where 301 days elapsed between the day of arraignment and the day of the trial, and the case was continued twice by court order stating that "all cases not otherwise disposed of are hereby ordered continued to the next regular term of court." Although docket congestion is "good cause" for delay in certain circumstances, the State never sought a continuance for this or any other reason, but instead relied on the "mass continuances" routinely made at the end of each court term. Yarber v. State, 573 So. 2d 727, 1990 Miss. LEXIS 786 (Miss. 1990).

13. Length of delay.

Defendant's statutory right to a speedy trial was not violated because 124 days elapsed between defendant's indictment and the first trial setting, an additional 75 days ticked by between the State's unexplained continuance request and defendant's request for a mental evaluation, and 27 more days went by between defendant's competency evaluation and his trial; all together the delays attributable to the State totaled 226 days; and that time period was within the 270 days the State was statutorily mandated to bring a defendant to trial. Brown v. State, 285 So. 3d 671, 2019 Miss. App. LEXIS 263 (Miss. Ct. App.), cert. denied, 284 So. 3d 753, 2019 Miss. LEXIS 438 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 483 (Miss. 2019).

Circuit court properly denied defendant's post-trial motion for a judgment notwithstanding the verdict because the State was not required to prove defendant used "force or violence" to escape where he was not charged with attempted escape, there was no evidence to support a jury instruction for misdemeanor escape, and his speedy trial claim had no merit since only 108 days elapsed between his arraignment and trial. Walker v. State, 238 So. 3d 1186, 2017 Miss. App. LEXIS 663 (Miss. Ct. App. 2017).

Defendant's statutory right to a speedy trial was not violated because the total number of days from March 20, 2002, to January 14, 2004, was 666; the delay caused by defendant totaled 374 days; and subtracting the days attributed to defendant left 292 days, which exceeded the 270-day rule; however, 197 of those days were not weighed against the State due to the delay at the crime lab. Walker v. State, 196 So. 3d 978, 2015 Miss. App. LEXIS 584 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 328 (Miss. 2016).

Two hundred and seventy day rule was not violated, because defendant was tried 70 days after being arraigned. Hoskins v. State, 172 So. 3d 1242, 2015 Miss. App. LEXIS 37 (Miss. Ct. App.), cert. denied, — So. 3d —, 2015 Miss. LEXIS 449 (Miss. 2015).

Defendant's conviction for the sexual battery of his minor daughter was appropriate because he failed to raise his statutory right to a speedy trial specifically under Miss. Code Ann. § 99-17-1. Additionally, when he raised his constitutional right to a speedy trial, it was well past the 270-day requirement of the statute. McBride v. State, 61 So. 3d 174, 2010 Miss. App. LEXIS 218 (Miss. Ct. App. 2010), superseded, 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's statutory right to a speedy trial under Miss. Code Ann. § 99-17-1 was not violated because the delays attributable to the state consisted of 268 days, which was within the 270-day statutory limit. White v. State, 969 So. 2d 72, 2007 Miss. App. LEXIS 247 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

In a case where there was a 580-day delay between arrest and trial, there was no violation of Miss. Code Ann. § 99-17-1 because 270 days had not passed between the arraignment and the trial. Bonds v. State, 938 So. 2d 352, 2006 Miss. App. LEXIS 703 (Miss. Ct. App. 2006).

Where defendant was arraigned for murder on August 28, 2002, and his trial did not begin until May 1, 2003, he was tried within 270 days of his arraignment, and his statutory right to a speedy trial was not violated. Amos v. State, 911 So. 2d 644, 2005 Miss. App. LEXIS 652 (Miss. Ct. App. 2005).

Time between defendant's arrest and trial amounted to 654 days, well in excess of eight months. The delay was presumptively prejudicial to the accused and sufficient to require application of the Barker factors; a balancing of the factors indicated that defendant was not denied his constitutional right to a speedy trial. Bates v. State, 886 So. 2d 4, 2004 Miss. App. LEXIS 434 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1366 (Miss. 2004).

Defendant was not deprived of his right to a speedy trial as defendant was tried within 263 days of being arraigned. Mayo v. State, 886 So. 2d 734, 2004 Miss. App. LEXIS 430 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1383 (Miss. 2004).

Defendant was not deprived of either his constitutional or his statutory right to a speedy trial as he entered his guilty plea and was convicted of a drug offense within seven months of his arraignment. Campbell v. State, 878 So. 2d 227, 2004 Miss. App. LEXIS 166 (Miss. Ct. App.), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 909 (Miss. 2004).

Defendant's right to a speedy trial was not violated, as approximately 197 days elapsed between defendant's arrest and trial and that number was well below the statutory limit of 270 days, and the greatest part of the delay between the commission of the felony and trial was directly and solely the consequence of defendant's flight; therefore, defendant's counsel was not ineffective for failing to file a motion to dismiss based on speedy trial grounds. Jackson v. State, 864 So. 2d 1047, 2004 Miss. App. LEXIS 66 (Miss. Ct. App. 2004).

Where defendant was put on trial 182 days after her arraignment, there was no violation of the 270-day rule found under Miss. Code Ann. § 99-17-1 (Rev. 2000). Ginn v. State, 860 So. 2d 675, 2003 Miss. LEXIS 512 (Miss. 2003).

Statutory speedy trial time period had not run, where defendant waived arraignment on November 9, 2000, and went to trial on June 25, 2001. Felder v. State, 831 So. 2d 562, 2002 Miss. App. LEXIS 684 (Miss. Ct. App. 2002).

Trial court did not err in denying petitioner's motion for postconviction relief where he failed to prove his assertions that he was denied his right to a speedy trial and that he received ineffective assistance of counsel; there was no evidence in the record of the starting date of petitioner's incarceration, but the record showed that 89 days elapsed between indictment and trial which the appellate court found was quite reasonable. Hill v. State, 827 So. 2d 743, 2002 Miss. App. LEXIS 532 (Miss. Ct. App. 2002).

The state was not required to show good cause for delay, and there was no violation of this section, where the defendant's trial commenced about 53 days after his arraignment. Davis v. State, 750 So. 2d 552, 1999 Miss. App. LEXIS 600 (Miss. Ct. App. 1999).

The defendant was entitled to have his case dismissed without prejudice to reindict where his trial was delayed for 273 days chargeable to the state due to poor docket management by the district attorney and circuit clerk's office. Williams v. State, 747 So. 2d 276, 1999 Miss. App. LEXIS 351 (Miss. Ct. App. 1999).

The defendant was brought to trial in less than 270 days where 425 days elapsed between arraignment and trial, but 176 days of delay were caused by continuances granted at her request. Swindle v. State, 755 So. 2d 1158, 1999 Miss. App. LEXIS 318 (Miss. Ct. App. 1999).

Delay of almost 26 months between indictment and trial warranted presumption of prejudice, thereby triggering inquiry into other constitutional speedy trial factors. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Delay in bringing defendant to trial in capital murder prosecution weighed heavily against defendant in constitutional speedy trial analysis where most delay was due to defendant and where State made no deliberate attempts that could be considered as oppressive conduct to harm defense. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Defendant failed to show that he was prejudiced by any speedy trial violation in delay in bringing him to trial on charge of capital murder; defendant did not claim that, because of delay, witnesses scheduled to testify for defense disappeared or that any evidence was lost or destroyed, and there was no showing that defendant could not defend against charge or that State engaged in oppressive conduct. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

14. — No prejudice; length of delay.

Defendant's statutory right to a speedy trial was not violated despite the delay of 321 days, as defendant did not suffer any prejudice. Hurst v. State, 195 So. 3d 736, 2016 Miss. LEXIS 244 (Miss. 2016).

15. Demand for trial.

Defendant was procedurally barred on direct appeal from raising the issue of whether defendant's right to a speedy trial was violated because, while defendant filed numerous motions on the issue, neither defendant nor, counsel set them for a hearing or requested a ruling. Dismissal without prejudice preserved defendant's ability to raise the issue in a motion for post-conviction relief in association with an ineffective assistance of counsel claim for failure to request a hearing on the motions. Ellis v. State, 141 So. 3d 415, 2013 Miss. App. LEXIS 718 (Miss. Ct. App. 2013), cert. denied, 140 So. 3d 940, 2014 Miss. LEXIS 317 (Miss. 2014).

Defendant's convictions for murder and kidnapping were proper because he was not denied his statutory right to a speedy trial. He did not complain about lack of a speedy trial until approximately 418 days after his arraignment, when he filed a demand for a speedy trial on August 24, 2007; thus, he in effect acquiesced to the delay. Lipsey v. State, 50 So. 3d 341, 2010 Miss. App. LEXIS 295 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

The defendant did not waive his right to a speedy trial where he filed a "Motion for Discovery/Speedy Trial Demand," notwithstanding that he did not compel a ruling on his motion until the morning of trial, at which time the trial court acknowledged the lateness of the hour for such motion. Williams v. State, 747 So. 2d 276, 1999 Miss. App. LEXIS 351 (Miss. Ct. App. 1999).

The defendant waived his right to complain about not being brought to trial within 270 days of arraignment where he sat idly by while the state went forward with one cause of action against him and did nothing to voice his objection to not being brought to trial on another cause of action against him; in addition, he neither attempted to or showed any prejudice to his defense caused by the delay. Byrd v. State, 741 So. 2d 1028, 1999 Miss. App. LEXIS 336 (Miss. Ct. App. 1999).

The court would reverse and remand to the trial court for a hearing to determine whether the defendant was prejudiced by the delay in his trial where (1) the delay between his arraignment and trial included 320 days that ran against the state, (2) there were no continuances on the record with regard to the overcrowded docket and there was no evidentiary basis, such as the docket calendars, to support the exclusion of any of the delay due to an overcrowded docket, and (3) the defendant filed a motion to dismiss his indictment for failure to provide him a speedy trial well within the 270 day period. Frazier v. State, 739 So. 2d 443, 1999 Miss. App. LEXIS 203 (Miss. Ct. App. 1999).

Defendant's initial assertion of his right to speedy trial in his motion to dismiss for failure to transcribe some proceedings while defendant was represented by his original trial counsel was not equivalent of demand for speedy trial and, thus, dilatory assertion of right to speedy trial weighed against him in constitutional analysis. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

16. Guilty plea.

Defendant's entry of a plea of guilty acted as a waiver of any speedy trial claim, whether based on statutory or constitutional grounds. Davidson v. State, 850 So. 2d 158, 2003 Miss. App. LEXIS 493 (Miss. Ct. App. 2003).

Inmate's petition for post-conviction relief on grounds that his counsel was ineffective for failing to inform him of his right to a speedy trial was denied, as the record showed he had been advised of his right to a speedy trial, and by his guilty plea he waived his constitutional and statutory rights to a speedy trial. Turner v. State, 864 So. 2d 288, 2003 Miss. App. LEXIS 679 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 35 (Miss. 2004).

Where the defendant pled guilty before being arraigned, there was no violation of his statutory right to a speedy trial. Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Peacock v. State, 783 So. 2d 763, 2000 Miss. App. LEXIS 471 (Miss. Ct. App. 2000).

17. Arraignment.

Defendant's statutory right to a speedy trial was not violated because defendant's trial began on the same day defendant was arraigned. Polk v. State, 205 So. 3d 1157, 2016 Miss. App. LEXIS 258 (Miss. Ct. App.), cert. denied, 205 So. 3d 1087, 2016 Miss. LEXIS 533 (Miss. 2016).

Defendant's right to a speedy trial under Miss. Code Ann. § 99-17-1 never began to run because defendant was never arraigned. Defendant was absent from the arraignment, and an instater capias was issued. Johnson v. State, 9 So. 3d 413, 2008 Miss. App. LEXIS 596 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 221 (Miss. 2009).

Miss. Code Ann. § 99-17-1 was not triggered in defendant's case because he was not arraigned nor did he ever explicitly waive arraignment. McGee v. State, 953 So. 2d 241, 2005 Miss. App. LEXIS 782 (Miss. Ct. App. 2005), rev'd, 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006).

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§ 99-17-3. Peremptory challenges; number allowed.

In capital cases the defendant and the state shall each be allowed twelve peremptory challenges. In cases not capital the accused and the state each shall be allowed six peremptory challenges; but all peremptory challenges by the state shall be made before the juror is presented to the prisoner. In all cases the accused shall have presented to him a full panel before being called upon to make his peremptory challenges.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 8; 1857, ch. 64, art. 297; 1871, § 2761; 1880, § 3076; 1892, § 1423; 1906, § 1496; Hemingway's 1917, § 1254; 1930, § 1277; 1942, § 2520; Laws, 1908, ch. 172.

Cross References — Examination of jurors by parties or their attorneys, see § 13-5-69.

Defendants tried jointly must agree in the challenges made without cause and are entitled only to the number to which one defendant is entitled, see § 99-17-5.

Voir dire examination of jurors, see Miss. Unif. Cir. & County Ct. Prac. R. 3.05.

Voir dire examination of jurors, see MRCrP 7.01, 18.3.

Number of peremptory challenges allowed, see MRCrP 18.4.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Challenge after acceptance.
3. Failure to exhaust peremptory challenges.
4. Prima facie showing of racial discrimination.
5. Applicability of Batson rule.
6. Loss of peremptory challenge.
7. Race-neutral reasons for challenge.
8. Increasing number of challenges.
9. Presentation of full panel required.
10. Time for challenge.

1. In general.

Because there was no possibility that defendant would be sentenced to life imprisonment by a jury in defendant's trial for armed robbery, and Bester (and its progeny) had not yet raised the possibility that the trial court could impose such a sentence, the trial court's ruling that defendant was only entitled to six peremptory challenges was not an abuse of discretion. Horton v. State, 253 So. 3d 334, 2018 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 390 (Miss. 2018).

Defendant made no assertion that his Sixth Amendment right to an impartial jury was violated due to the jury-selection process because he did not claim the jury was composed of incompetent jurors; defendant failed to show how the departure from that statute and rules regarding peremptory challenges affected his fundamental, substantive rights or otherwise led to a manifest miscarriage of justice. Carr v. State, 190 So. 3d 1, 2015 Miss. App. LEXIS 605 (Miss. Ct. App. 2015).

Misallocation of defendant's peremptory challenges did not affect a fundamental, substantive right because so long as the jury that sat was impartial, the fact that defendant had to pool his regular and alternate peremptory challenges to achieve that result did not mean his Sixth Amendment rights were violated; despite being selected in an irregular manner, the jury was a legal jury with the authority to render a verdict against defendant. Carr v. State, 190 So. 3d 1, 2015 Miss. App. LEXIS 605 (Miss. Ct. App. 2015).

On review, the trial court's determinations under Batson are afforded great deference because they are, in large part, based on credibility; the appellate court will not reverse any factual findings relating to a Batson challenge unless they are clearly erroneous. Murphy v. State, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

Mississippi Supreme Court has held that the trial judge is afforded great deference in determining if the expressed reasons for exclusion of a venire person from the challenged party is in fact race neutral. Murphy v. State, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

One of the reasons the trial court is granted such deference in a Batson issue is that the demeanor of the attorney making the challenge is often the best evidence on the issue of race neutrality; the judge is in the best position to assess the overall credibility of the statements made in voir dire and by presenters of the peremptory strikes. Murphy v. State, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

Because defendant's offenses were noncapital, the statutory provision of Miss. Code Ann. § 99-17-3 which provided extra peremptory challenges to the venire in capital cases were inapplicable and defendant was entitled only to the regular number of six peremptory challenges. Miles v. State, 864 So. 2d 963, 2003 Miss. App. LEXIS 1039 (Miss. Ct. App. 2003).

Defendant failed to establish prima facie case of gender discrimination arising from prosecution's exercise of seven peremptory challenges against females where percentage of female venire members struck was nearly equivalent to percentage of females in venire upon which prosecution passed with three peremptory strikes unused; ultimate composition of jury, with eight females, produced percentage of women higher than percentage of females on original venire. Simon v. State, 679 So. 2d 617 (Miss. 1996).

In order to prove that state used peremptory challenges in unconstitutional manner, defendant had to show that he was a member of cognizable racial group, that prosecutor exercised peremptory challenges to excuse venireperson of defendant's case, and that there was an inference that the venirepersons were excluded on account of their race; burden thereafter shifts to state to come forward with race-neutral explanation for challenging jurors, but prosecutor's explanation need not rise to level of challenge for cause. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Fact that 10 of 14 jurors and alternates were women precluded claim that prosecution engaged in improper gender based discrimination when exercising peremptory challenges. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Defendant was not denied opportunity to intelligently use peremptory challenges when trial court conducted voir dire itself; trial court asked venire whether anyone would automatically vote for death penalty regardless of mitigating circumstances, counsel for both sides stated they were satisfied with voir dire, and defendant did not ask trial court to further voir dire jurors and did not ask that she be allowed to do so. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A defendant was not denied his right to use a peremptory challenge on a juror who failed to answer the defense attorney's question during voir dire as to whether any of the jurors knew either attorney in the case, even though the juror had been injured when the defense attorney collided with him during a softball game 3 years earlier, where the juror did not recognize the defense attorney at the time of voir dire and only sometime thereafter recognized him as being the person who had collided with him at the ball game, the juror had not seen the defense attorney since that time, and the juror said that he felt no ill will toward the attorney for the injury he received and that the incident did not color his judgments during trial. Bush v. State, 585 So. 2d 1262, 1991 Miss. LEXIS 589 (Miss. 1991).

State court's erroneous refusal to remove juror favoring death penalty, which refusal forces defense to use peremptory challenge, does not violate defendant's right to impartial jury or to due process. Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80, 1988 U.S. LEXIS 2871 (U.S. 1988).

Jury selection procedure provided in Circuit Court Rule 13, which requires that counsel for the defendant direct his questions on voir dire to the entire group of jurors presented, is not improper, so long as the defendant is given a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge a juror. Peters v. State, 314 So. 2d 724, 1975 Miss. LEXIS 1683 (Miss.), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392, 1975 U.S. LEXIS 3639 (U.S. 1975).

That, on the trial of the defendant charged with murder, the prosecuting attorney peremptorily excused two prospective jurors who on their voir dire examination had given equivocal answers regarding their attitude toward the imposition of capital punishment did not prejudice the defendant's rights. Capler v. State, 237 So. 2d 445, 1970 Miss. LEXIS 1509 (Miss. 1970), vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754, 1972 U.S. LEXIS 1910 (U.S. 1972).

Where on the trial of a homicide one of the jurors becomes insane it is the duty of the court to begin the trial de novo reconstituting the jury as a whole and giving him the right to all challenges he originally had. Dennis v. State, 96 Miss. 96, 50 So. 499, 1909 Miss. LEXIS 23 (Miss. 1909).

2. Challenge after acceptance.

In a prosecution for capital murder, the trial court erred in permitting the state to peremptorily challenge on juror after the panel had been accepted on the grounds that the juror's son was under indictment in a criminal matter where the record did not show that the juror was incompetent to serve and where the challenged juror could not be presumed to be incompetent merely because her son had been indicted; the trial court further erred by denying defendant's peremptory challenge to the alternate juror, where it seemed to discriminate against defendant in favor of the state. Fairness required that defendant be granted a new trial. Caldwell v. State, 381 So. 2d 591, 1980 Miss. LEXIS 1862 (Miss. 1980).

On the trial for homicide, it was error to permit the state to peremptorily challenge one juror, after he had been accepted by the state, and a full panel tendered to defendant and to then refuse to permit defendant to peremptorily challenge another juror, who finally sat upon the trial jury, after he had been accepted by both the state and defendant, but before the final acceptance of the panel. Cook v. State, 85 Miss. 738, 38 So. 110, 1904 Miss. LEXIS 120 (Miss. 1904).

3. Failure to exhaust peremptory challenges.

A prerequisite to presentation of a claim of a denial of constitutional rights due to denial of a challenge for cause is a showing that the defendant had exhausted all of his or her peremptory challenges and that the incompetent juror was forced to sit on the jury due to the trial court's erroneous ruling. Mettetal v. State, 602 So. 2d 864, 1992 Miss. LEXIS 413 (Miss. 1992).

A murder defendant was not denied a fair trial by virtue of the fact that 9 of the 42 members of the regular and special venire panels had relatives who had been murdered where 7 of the members of the venire who had had relatives murdered did not serve on the jury and the defense had sufficient peremptory challenges remaining to remove the other 2 jurors if they so desired. Shell v. State, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

Error of court in refusing to excuse jurors for cause in criminal case will not be considered on appeal where it appears from record that appellant used only five peremptory challenges and hence his peremptory challenges were not exhausted. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

4. Prima facie showing of racial discrimination.

White defendant has standing to raise Batson challenge against exclusion of Black prospective jurors. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Trial court should have provided defense an opportunity to prove evidence of prima facie Batson violation in state's use of ten of its 12 peremptory challenges against Black prospective jurors; trial court erroneously held that white defendant did not have standing to raise Batson issue. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Under the Batson test, the prosecutor satisfied the burden of articulating a nondiscriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are particular to any race. Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834, 1995 U.S. LEXIS 3181 (U.S. 1995).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. Colosimo v. Senatobia Motor Inn, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in the defendant's case; a defendant may establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Griffin v. State, 607 So. 2d 1197, 1992 Miss. LEXIS 603 (Miss. 1992).

A defendant failed to establish a prima facie case of racial discrimination in jury selection, even though the defendant was black and the prosecution exercised peremptory challenges to eliminate 3 black jurors, where the jurors were excluded because they were acquainted with the defendant; while excluding jurors on the ground that they were acquainted with the defendant might have had a discriminatory effect since the defendant's acquaintances were primarily black, the law does not proscribe the mere incidental exclusion of blacks from a jury. Govan v. State, 591 So. 2d 428, 1991 Miss. LEXIS 836 (Miss. 1991).

A murder defendant's argument that the jury was patently flawed because the jury was white and the defendant was black was without merit. The mere fact that a jury is white and a defendant is black does not violate Batson, but rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the Batson rule. Sudduth v. State, 562 So. 2d 67, 1990 Miss. LEXIS 235 (Miss. 1990).

No prima facie case of racial discrimination was shown in the prosecution's use of peremptory challenges, even though the prosecutor exercised 5 of his 7 peremptory challenges against black jurors, where the victim of the crime charged and the defendant were black, the prosecutor and the defendant had several challenges left, numerous potential black jurors were left uncalled, and one black juror was in the jury box. Dennis v. State, 555 So. 2d 679, 1989 Miss. LEXIS 465 (Miss. 1989).

A defendant established a prima facie case of purposeful discrimination in the selection of a petit jury where he showed that he was a black person and that the district attorney had exercised peremptory challenges to remove 5 black persons from the jury. The fact that the prosecution used all of the peremptory strikes necessary to remove all but one black person from the jury satisfied the requirement of raising an inference of racial discrimination. Conerly v. State, 544 So. 2d 1370, 1989 Miss. LEXIS 265 (Miss. 1989).

A black defendant made a prima facie showing of purposeful discrimination in the selection of a jury where the jury-including one alternate juror-was composed of 10 white persons and 3 black persons, and where the prosecution exercised 12 peremptory challenges, 7 of which were used to exclude black persons from the jury. Chisolm v. State, 529 So. 2d 630, 1988 Miss. LEXIS 323 (Miss. 1988).

When a criminal defendant establishes a prima facie case of the impermissible exclusion of black jurors through the use of peremptory challenges, the burden of proof shifts to the state to come forward with a racially neutral explanation for each of the challenges that must be related to the particular case being tried. Dedeaux v. State, 519 So. 2d 886, 1988 Miss. LEXIS 48 (Miss. 1988).

5. Applicability of Batson rule.

Where defendant's first trial resulted in a mistrial based on a Batson challenge, because the jury had not been sworn, the rules prohibiting double jeopardy were not violated; as such double jeopardy protection did not attach to defendant's first proceeding, so did not preclude a second trial. Gaskin v. State, 856 So. 2d 363, 2003 Miss. App. LEXIS 164 (Miss. Ct. App. 2003).

The Batson rule applies to both a prosecutor's and a defendant's peremptory challenges. Griffin v. State, 610 So. 2d 354, 1992 Miss. LEXIS 749 (Miss. 1992).

A white defendant had standing to object to the State's use of 5 of its 6 peremptory challenges to strike black jurors; however, the defendant failed to establish a prima facie case of discrimination where the State offered race neutral reasons for striking each individual black juror and the defendant's attorney offered no evidence to rebut the State's reasons for striking the jurors. Green v. State, 597 So. 2d 656, 1992 Miss. LEXIS 206 (Miss. 1992).

White criminal defendant had standing to raise equal protection objection to prosecutor's allegedly race-based exercise of peremptory challenges to exclude black prospective jurors; same-race limitation on defendant's right to object would conform with neither substantive guarantees of equal protection clause and policies underlying federal criminal prohibition against discrimination in jury selection, nor accepted rules of third party standing to raise federal constitutional claim. Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411, 1991 U.S. LEXIS 1857 (U.S. 1991).

6. Loss of peremptory challenge.

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. Mettetal v. State, 602 So. 2d 864, 1992 Miss. LEXIS 413 (Miss. 1992).

7. Race-neutral reasons for challenge.

Trial court properly sustained State's Batson objections to defendant's attempts to peremptory challenge jurors because he had a bad feeling about them based on their demeanors; defendant's reasons for exercising his challenges were not race-neutral. Murphy v. State, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

Included among the reasons accepted as race neutral are: age, marital status, single with children, prosecutor distrusted juror, educational background, employment history, criminal record, young and single, friend charged with crime, unemployed with no roots in community, posture and demeanor indicating juror was hostile to being in court, juror was late, short term employment; the Mississippi Supreme Court has also accepted demeanor as a legitimate, race neutral basis for a peremptory challenge. Murphy v. State, 868 So. 2d 1030, 2003 Miss. App. LEXIS 1161 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 297 (Miss. 2004).

State was required to present to trial court the race-neutral reasons for its peremptory challenges; race-neutral reasons were never presented to trial court and it never exercised its discretion in considering defendant's Batson challenge. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Batson hearing was necessary to elicit racially-neutral reasons from prosecutor for using ten of its 12 peremptory challenges against Black prospective jurors. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

One factor in determining whether prosecutor's race-neutral explanation for challenge to juror is pretextual is relationship with the reason to the actual facts of the case. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecutor's stated reason for peremptory challenge against juror, that juror stated that there was nothing she could do about the fact that her sister had been accused of but not charged with killing her brother and that the Lord would take care of it, was sufficiently related to murder prosecution so as not to be deemed pretextual, as her statement could be viewed as placing punishment of wrongdoer in the hands of the Lord. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecutor's basis for peremptory challenge against juror, that defense counsel had stated "I love her to death," was sufficiently race-neutral. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecution presented race-neutral reason for peremptory strike of prospective juror in capital murder case; prospect had teenage daughter, and manner in which she responded to questions led prosecutor to feel that she was dealing with some problem prosecutor was unable to reach, and court indicated that prospect's demeanor was different from that of other prospects who had children. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution provided race-neutral reason for peremptory strike of black prospective juror in capital murder case; prospect took care of approximately 30 hogs and between 30 or 40 chickens, and would not be able to maintain her responsibilities if jury was required to be sequestered. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution gave race-neutral reason for peremptorily striking black prospective juror in capital murder case; juror had indicated unwillingness to serve and had stated that she might have difficulty in coming to any definite conclusion. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution provided race-neutral reason for peremptory challenge of black prospective juror in capital murder case; prospect was on board of directors of organization devoted to providing back-up for defense attorneys in capital cases. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge-that the juror indicated she would have difficulty finding suitable child care during the trial-was sufficiently race-neutral. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

The reasons proffered by the State for using 5 of its 7 peremptory challenges against black jurors were sufficient to withstand a Batson challenge where the reasons given were (1) the juror had a brother in the penitentiary; (2) the juror had attended high school with the defendant; (3) the juror wore dark glasses in the courtroom; (4) the juror was employed in a company in which there had been a riot which was quelled by the police; and (5) the juror shared a last name with many persons in the penitentiary and the prosecutor believed he was related to an inmate, and the defense made no attempt to show that the reasons proffered were pretextual, of disparate impact, or not true. Henderson v. State, 641 So. 2d 1184, 1994 Miss. LEXIS 374 (Miss. 1994).

Some acceptable race-neutral reasons for challenging a juror are: (1) involvement in criminal activity; (2) unemployment; (3) employment history; (4) relative of juror involved in crime; (5) low income occupation; (6) juror wore gold chains, rings and watch; and (7) dress and demeanor. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

The State's reasons for using 4 of its 5 peremptory challenges against black jurors were sufficiently race-neutral where the first juror had a pending civil lawsuit, the second juror had worked with a defense witness and the prosecution objected to his age and demeanor, the third juror had previously sat on 2 criminal juries which resulted in one "not guilty" verdict and one mistrial, and the prosecutor was unable to make eye contact with the fourth juror while the juror continuously made eye contact with the defendant. Harper v. State, 635 So. 2d 864, 1994 Miss. LEXIS 201 (Miss. 1994), limited, Flowers v. State, 947 So. 2d 910, 2007 Miss. LEXIS 24 (Miss. 2007).

The reasons given by a district attorney for exercising a peremptory challenge to excuse a black juror were sufficiently race-neutral where the district attorney stated that the juror was a truck driver "which may or may not mean he's a transient," the juror wore overalls with a black T-Shirt in the courtroom, and he was unmarried and did not have children "which shows that he doesn't have a stake in the community like somebody that's established." Bradley v. State, 562 So. 2d 1276, 1990 Miss. LEXIS 267 (Miss. 1990).

After the State has supplied a neutral nonracial explanation for peremptory challenges, in the absence of an actual proffer of evidence by the defendant concerning this issue, the Supreme Court may not reverse on this point. It is incumbent upon the defendant to come forward with proof when given the opportunity for rebuttal. Davis v. State, 551 So. 2d 165, 1989 Miss. LEXIS 364 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797, 1990 U.S. LEXIS 1741 (U.S. 1990).

Although a peremptory challenge cannot be exercised for a racially discriminatory reason, this does not preclude the exercise of a peremptory challenge for a non-race-based reason that objective and fair-minded persons might regard as absurd. Chisolm v. State, 529 So. 2d 635, 1988 Miss. LEXIS 348 (Miss. 1988).

8. Increasing number of challenges.

Use of the word "shall" in Miss. Code Ann. 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01 implies that the trial court has no discretion in the number of peremptory strikes given to each side; therefore, a trial court did not err by refusing to allow defendant additional peremptory strikes under § 99-17-3 and Rule 10.01 after five were denied due to an improper attempt to exclude Caucasian males from the jury in a statutory rape and sexual battery case. Jones v. State, 951 So. 2d 568, 2006 Miss. App. LEXIS 621 (Miss. Ct. App. 2006), cert. dismissed, 220 So. 3d 979, 2017 Miss. LEXIS 259 (Miss. 2017).

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual offender statute, Miss. Code Ann. § 99-19-83(3). Jones v. State, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

Trial court was not required to grant capital murder defendant additional peremptory challenges, for use in eliminating prospective jurors that trial court refused to remove for cause despite their avowed favoritism toward death penalty; defendant had not supported his claim that there were an unusual number of persons favoring death penalty among venirepersons, those that court had declined to remove for cause had been rehabilitated and those whose views on subject remained "unwavering" had been removed. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Fact that 3 defendants were jointly tried did not operate to increase number of peremptory challenges; defendants charged with murder were entitled to 12 peremptory challenges because this was capital case, and received more than statutorily mandated number when trial court increased number of challenges for each side to 15 upon denying defendants' motion for 36 challenges. Johnson v. State, 512 So. 2d 1246, 1987 Miss. LEXIS 2703 (Miss.), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402, 1987 U.S. LEXIS 4990 (U.S. 1987), overruled in part, Smith v. State, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

In a prosecution for carrying a concealed weapon after conviction of a felony which resulted in a life sentence under the habitual criminal statute, the defendant was not entitled to 12 peremptory challenges to the jury where the principal offense of carrying a concealed weapon was not a capital crime. Osborne v. State, 404 So. 2d 545, 1981 Miss. LEXIS 2219 (Miss. 1981).

In a prosecution for capital murder, the defendant was not entitled to separate juries for the guilt and sentencing phases of his trial; since the same jury tried both phases of the trial, the defendant was only entitled to 12 peremptory challenges rather than the 24 he requested. Tubbs v. State, 402 So. 2d 830, 1981 Miss. LEXIS 2129 (Miss. 1981).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under § 99-19-83, the defendant's demand for a special venire under § 13-5-77 and for 12 peremptory challenges under this section was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; § 99-19-83 does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March 14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. Yates v. State, 396 So. 2d 629, 1981 Miss. LEXIS 1992 (Miss. 1981).

9. Presentation of full panel required.

In a prosecution for murder in which defendant moved for a special venire, the trial court committed reversible error where, instead of filling the panel with members of that week's regular jury panel who were in the courtroom, it presented defendant with the 11 jurors who had been accepted by the State, and, over objection, required the defense to make its peremptory challenges to the 11 accepted jurors, in violation of statute mandating that in capital cases the defendant must be presented a full panel before being called upon to make his 12 peremptory challenges. Sellen v. State, 374 So. 2d 781, 1979 Miss. LEXIS 2346 (Miss. 1979).

Provision in this section that the accused shall have presented to him a full panel before being called upon to make his peremptory challenges means that the accused must have 12 jurors presented to him, who have been accepted as jurors by the state, before he is required to challenge any of the jurors. Peters v. State, 314 So. 2d 724, 1975 Miss. LEXIS 1683 (Miss.), cert. denied, 423 U.S. 1019, 96 S. Ct. 457, 46 L. Ed. 2d 392, 1975 U.S. LEXIS 3639 (U.S. 1975).

10. Time for challenge.

In prosecution for grand larceny of a bull, where defendant did not exercise any peremptory challenges when a full panel of twelve jurors was tendered to him in open court, and where he could not question or seek to question such jurors, the accused could not contend on appeal as to the manner of selection of jury that required him to exercise peremptory challenges in secret conference, was prejudicial. Hollis v. State, 221 Miss. 677, 74 So. 2d 747, 1954 Miss. LEXIS 577 (Miss. 1954).

In prosecution for murder where a juror was qualified and accepted by both parties and upon a full panel being tendered, refusing defense permission to peremptorily challenge the juror was not error. Byrd v. State, 179 Miss. 336, 175 So. 190, 1937 Miss. LEXIS 30 (Miss. 1937).

Court properly refused to permit defendant to peremptorily challenge juror who had already been accepted by both state and defendant. Dixon v. State, 164 Miss. 540, 143 So. 855, 1932 Miss. LEXIS 226 (Miss. 1932).

A defendant should withhold all peremptory challenges until presented with a full panel and should not interpose such a challenge on the overruling of a challenge for cause while the panel is incomplete. Gammons v. State, 85 Miss. 103, 37 So. 609, 1904 Miss. LEXIS 137 (Miss. 1904).

Under this section [Code 1942, § 2520] the defendant is entitled to have presented to him a full panel of jurors all of whom have been accepted by the state. He may challenge any juror so presented and when the vacancies caused by his challenges are filled and the added jurors accepted by the state he may challenge any of the added jurors. Funderburk v. State, 75 Miss. 20, 21 So. 658, 1897 Miss. LEXIS 84 (Miss. 1897).

A prisoner is entitled to have the jury panel filled by the state after he has refused any of the jurors tendered him before again exercising his right of peremptory challenge. State v. Mitchel, 12 So. 710 (Miss. 1893).

The peremptory challenge of a juror by the state after he has been presented to the prisoner is forbidden. Stewart v. State, 50 Miss. 587, 1874 Miss. LEXIS 97 (Miss. 1874).

RESEARCH REFERENCES

ALR.

Peremptory challenge after acceptance of juror. 3 A.L.R.2d 499.

Use of peremptory challenge to exclude from jury persons belonging to a race or class. 4 A.L.R.2d 1200.

Jury: number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together. 21 A.L.R.3d 725.

Use of peremptory challenge to exclude from jury persons belonging to class or race. 79 A.L.R.3d 14.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 A.L.R.3d 15.

Additional peremptory challenges because of multiple criminal charges. 5 A.L.R.4th 533.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent or punishment. 8 A.L.R.4th 149.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury–post-Batson state cases. 20 A.L.R.5th 398.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury–post-Batson state cases. 47 A.L.R.5th 259.

Judicial Removal for Cause and Peremptory Strike Validity Under Against Jurors Based upon Viewing Police Procedural Programs, Live Television Trials, Reality Legal Television, or Other Crime and Legal Based Television Programs. 84 A.L.R.6th 229.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury–post-Batson federal cases. 110 A.L.R. Fed. 690.

Am. Jur.

47 Am. Jur. 2d, Jury §§ 206 et seq.

30 Am. Jur. Trials 561, Jury Selection and Voir Dire in Criminal Cases.

CJS.

50A C.J.S., Juries §§ 352 et seq.

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Note, Constitutional Law – Equal Protection Clause Bars Prosecutors' Peremptory Challenge Based Solely on Race, 7 Miss. C. L. Rev. 169, Spring, 1987.

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Note, Constitutional Law – Equal Protection Clause Bars Prosecutors' Peremptory Challenge Based Solely on Race, 7 Miss. C. L. Rev. 169, Spring, 1987.

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Practice References.

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§ 99-17-5. Peremptory challenges; joint defendant must agree.

Defendants tried jointly must agree in their challenges made without cause, and shall be entitled to only the number to which one defendant is entitled.

HISTORY: Codes, 1880, § 3070; 1892, § 1419; 1906, § 1492; Hemingway's 1917, § 1250; 1930, § 1273; 1942, § 2516.

Cross References — Examination of jurors by parties or their attorneys, see § 13-5-69.

Number of peremptory challenges allowed, see § 99-17-3.

Voir dire examination of jurors, see Miss. Uniform Rules of Circuit and County Court Practice, Rules 3.05 and 10.01.

JUDICIAL DECISIONS

1. In general.

State court's erroneous refusal to remove juror favoring death penalty, which refusal forces defense to use peremptory challenge, does not violate defendant's right to impartial jury or to due process. Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80, 1988 U.S. LEXIS 2871 (U.S. 1988).

Fact that 3 defendants were jointly tried did not operate to increase number of peremptory challenges; defendants charged with murder were entitled to 12 peremptory challenges because this was capital case, and received more than statutorily mandated number when trial court increased number of challenges for each side to 15 upon denying defendants' motion for 36 challenges. Johnson v. State, 512 So. 2d 1246, 1987 Miss. LEXIS 2703 (Miss.), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402, 1987 U.S. LEXIS 4990 (U.S. 1987), overruled in part, Smith v. State, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

The trial court in an armed robbery prosecution properly overruled the motion of defendants who were being tried jointly to be allowed 12 peremptory challenges to the jury panel in view of § 99-17-5. Blanks v. State, 451 So. 2d 775, 1984 Miss. LEXIS 1782 (Miss. 1984).

RESEARCH REFERENCES

ALR.

Jury: Number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together. 21 A.L.R.3d 725.

Use of peremptory challenge to exclude from jury persons belonging to class or race. 79 A.L.R.3d 14.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury–post-Batson state cases. 20 A.L.R.5th 398.

Judicial Removal for Cause and Peremptory Strike Validity Under Against Jurors Based upon Viewing Police Procedural Programs, Live Television Trials, Reality Legal Television, or Other Crime and Legal Based Television Programs. 84 A.L.R.6th 229.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury–post-Batson federal cases. 110 A.L.R. Fed. 690.

Am. Jur.

47 Am. Jur. 2d, Jury § 208.

30 Am. Jur. Trials 561, Jury Selection and Voir Dire in Criminal Cases.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

1987 Mississippi Supreme Court Review, Peremptory challenges. 57 Miss. L. J. 497, August, 1987.

Note, Beyond Batson: eliminating gender-based peremptory challenges. 105 Harv L Rev 1920, June, 1992.

Practice References.

Perrin, Caldwell and Chase, Art and Science of Trial Advocacy (Anderson).

§ 99-17-7. Interpreters.

In criminal cases wherein the defendant has been declared indigent, the court may appoint an interpreter who is certified as provided in Section 9-21-73, when necessary, sworn truly to interpret, and allow him a reasonable compensation, as set by the court, payable out of the county treasury.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1(80); 1857, ch. 61, art. 158; 1871, § 640; 1880, § 1713; 1892, § 731; 1906, § 792; Hemingway's 1917, § 576; 1930, § 585; 1942, § 1529; Laws, 2000, ch. 389, § 1; Laws, 2006, ch. 569, § 7, eff from and after July 1, 2006.

Cross References — Program for use of interpreters in all courts generally, see §§ 9-21-71 through 9-21-81.

Appointment of interpreter for the deaf in judicial proceedings and custodial situations, see §§ 13-1-301 et seq.

Appointment of counsel for indigents, see § 99-15-15.

OPINIONS OF THE ATTORNEY GENERAL

A court has the obligation to appoint an interpreter when necessary in criminal cases to insure the defendant's due process rights, and the cost of the interpreter may not be considered a cost of court payable by the defendant upon conviction or by the county upon acquittal. Aldridge, Jan. 25, 2002, A.G. Op. #02-0010.

A municipality is not prohibited from, and may provide, payment of an indigent's use of an interpreter in municipal court. Sorrell, Sept. 11, 2006, A.G. Op. 06-0911.

RESEARCH REFERENCES

ALR.

Right of accused to have evidence or court proceedings interpreted. 36 A.L.R.3d 276.

Disqualification, for bias, of one offered as interpreter of testimony. 6 A.L.R.4th 158.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant. 79 A.L.R.4th 1102.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant. 86 A.L.R.4th 698.

Right of accused to have evidence or court proceedings interpreted, because accused or other participant in proceeding is not proficient in the language used. 32 A.L.R.5th 149.

§ 99-17-9. Trial in the absence of accused.

In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

HISTORY: Codes, 1857, ch. 64, art. 303; 1871, § 2807; 1880, § 3075; 1892, § 1422; 1906, § 1495; Hemingway's 1917, § 1253; 1930, § 1276; 1942, § 2519; Laws, 2005, ch. 456, § 1, eff from and after July 1, 2005.

Cross References — Absence from state of person against whom cause of action has accrued as tolling time limited for commencement of action, see § 15-1-63.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Presence of defendant waived.
3. Time to raise objection.
4. Warning.
5. Particular circumstances.

1. In general.

There is a long history of precedent for the constitutionality of trial in absentia under Miss. Code Ann. § 99-17-9. Being tried in absentia does not violate the United States Constitution. Ali v. State, 2004 Miss. App. LEXIS 1118 (Miss. Ct. App. Dec. 7, 2004), sub. op., op. withdrawn, 928 So. 2d 237, 2006 Miss. App. LEXIS 336 (Miss. Ct. App. 2006).

The defendant's due process rights were not violated when he was tried in absentia on two traffic citations. Wheeler v. Stewart, 798 So. 2d 386, 2001 Miss. LEXIS 42 (Miss. 2001).

In the limited circumstance where the defendant, who is out on bond and represented by counsel, fails to appear at the commencement of his trial, but appears before any evidence is taken, he is not entitled to a new trial unless he shows prejudice resulting from his absence at the commencement of the trial. Simmons v. State, 1999 Miss. LEXIS 179 (Miss. May 13, 1999), op. withdrawn, sub. op., 746 So. 2d 302, 1999 Miss. LEXIS 246 (Miss. 1999).

When a motion for a new trial not considered by circuit judge during court term at which defendant was convicted, is considered by the judge of next trial term, the defendant should be present unless his presence is waived by his counsel. Willette v. State, 219 Miss. 793, 69 So. 2d 407, 1954 Miss. LEXIS 386 (Miss. 1954).

This section [Code 1942, § 2519] merely gives the accused the privilege of waiving his presence at the trial. Thomas v. State, 117 Miss. 532, 78 So. 147, 1918 Miss. LEXIS 170 (Miss. 1918).

This statute does not violate § 26 of the state constitution. Williams v. State, 103 Miss. 147, 60 So. 73, 1912 Miss. LEXIS 148 (Miss. 1912).

An instance where the circuit court did not abuse its discretion in trying a defendant in his absence on a charge of selling intoxicating liquors. Williams v. State, 103 Miss. 147, 60 So. 73, 1912 Miss. LEXIS 148 (Miss. 1912).

If an offender be tried in his absence he cannot, on a motion for a new trial, require that the state witnesses be compelled to reappear and repeat the testimony which they had given before the jury to enable him to make out a bill of exceptions. Fugler v. State, 58 Miss. 829, 1881 Miss. LEXIS 48 (Miss. 1881).

2. Presence of defendant waived.

Circuit court did not abuse its discretion in finding defendant willfully, voluntarily and deliberately absented himself from the trial and proceeding to trial in his absence. Although defendant claimed he was prejudiced because he was not present to argue the credibility of the witnesses and their identification of him as one of the perpetrators, defendant's deliberate absence from his trial operated as a waiver of the right to be present. McDonald v. State, 226 So. 3d 626, 2017 Miss. App. LEXIS 554 (Miss. Ct. App. 2017).

In an armed robbery case, defendant was properly tried in absentia under this statute because he waived his arraignment and entered a plea, and he received notifications regarding his trial date; therefore, defendant waived his right to be present at his trial. Carroll v. State, 196 So. 3d 1054, 2016 Miss. App. LEXIS 17 (Miss. Ct. App.), cert. denied, 202 So. 3d 614, 2016 Miss. LEXIS 326 (Miss. 2016).

Defendant's constitutional right to confront his accusers and be present and sentencing were not violated when defendant was convicted and sentenced in absentia of felony third-offense domestic violence, Miss. Code Ann. § 97-3-7(3), because defendant voluntarily waived his sentence at trial and sentencing, pursuant to Miss. Code Ann. § 99-17-9, by willfully failing to attend; defendant spoke with his attorney the morning of trial and indicated he was attending but defendant never showed up. Robinson v. State, 66 So. 3d 198, 2011 Miss. App. LEXIS 396 (Miss. Ct. App. 2011).

In a possession of cocaine and possession of marijuana case, defendant voluntarily waived his right to be present because he escaped while in custody and was still unaccounted for at the time of his sentencing hearing. Jenkins v. State, 997 So. 2d 207, 2008 Miss. App. LEXIS 460 (Miss. Ct. App. 2008).

Testimony was offered by the State that indicated defendant was clearly aware of his trial date and defendant failed to contact his attorney or the court regarding his whereabouts; therefore, there was no error by the trial court in deciding to try defendant in absentia. Williams v. State, 881 So. 2d 963, 2004 Miss. App. LEXIS 895 (Miss. Ct. App. 2004).

Although the circuit court found that the justice court judge denied petitioner the constitutional right to counsel under Miss. Const. Art. 3, § 26 and the U.S. Const. Amend. VI, petitioner clearly had notice of the pending trial, petitioner and petitioner's attorney were aware that the motion for continuance, which the trial court did not err in denying, had been denied; thus, the justice court judge did not err in proceeding to trial in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 and petitioner was not denied the constitutional right to counsel. In re Chisolm, 837 So. 2d 183, 2003 Miss. LEXIS 42 (Miss. 2003).

Circuit court erred in issuing a writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary and appeals from the justice court to the circuit court required a trial de novo, Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence and, therefore, the grant of the writ of mandamus was in error pursuant to Miss. Code Ann. § 11-41-1. In re Chisolm, 837 So. 2d 183, 2003 Miss. LEXIS 42 (Miss. 2003).

Defendant's convictions for burglary and armed robbery were both proper where the trial court validly proceeded with the trial in defendant's voluntary absence because he was present at the commencement of trial and remained through the selection and swearing in of a jury. Brown v. State, 839 So. 2d 597, 2003 Miss. App. LEXIS 165 (Miss. Ct. App. 2003).

Trial court properly sentenced defendant in absentia following her conviction of selling cocaine as defendant had waived her presence by not appearing; even though defendant had not been present when the verdict was announced, her counsel had informed her of the conviction and instructed her to report to the sheriff the day prior to sentencing and, had she done so, she would have been aware of the sentencing date. Carmichael v. State, 832 So. 2d 568, 2002 Miss. App. LEXIS 302 (Miss. Ct. App. 2002).

Appellate courts have clearly established the constitutionality of trial in absentia, it was proper to continue a trial where the defendant has fled after trial has commenced. Jefferson v. State, 807 So. 2d 1222, 2002 Miss. LEXIS 40 (Miss. 2002).

Where accused felon was present at the preliminary hearing and was in the attorney's office in trial preparations the day before trial, but did not appear at commencement or other stages of trial, his presence at trial was not waived by his failure to appear. Mallard v. State, 798 So. 2d 539, 2001 Miss. LEXIS 279 (Miss. 2001).

If the defendant voluntarily absents himself from the trial at any point after the trial begins, the trial can go on in his absence, regardless of whether the defendant was in custody. McKnight v. State, 738 So. 2d 312, 1999 Miss. App. LEXIS 205 (Miss. Ct. App. 1999).

Statute governing trial in absence of accused does not offend dictates of State Constitution, which sets forth rights to confront accusers and to be present at trial. (Per Banks, J., with three Justices concurring and one Justice concurring in part. Jackson v. State, 689 So. 2d 760, 1997 Miss. LEXIS 39 (Miss. 1997), superseded, Monroe v. Monroe, 745 So. 2d 249, 1999 Miss. LEXIS 229 (Miss. 1999).

Defendants did not waive right to be present at trial where defendants were not present at commencement of trial, since first defendant arrived at trial during cross-examination of state's second witness and second defendant arrived during selection of jury panel after voir dire was completed, and conducting of trial without such waiver was reversible error. Jackson v. State, 689 So. 2d 760, 1997 Miss. LEXIS 39 (Miss. 1997), superseded, Monroe v. Monroe, 745 So. 2d 249, 1999 Miss. LEXIS 229 (Miss. 1999).

The presence of accused at the hearing of a motion for a new trial may be waived. Stokes v. State, 240 Miss. 453, 128 So. 2d 341, 1961 Miss. LEXIS 477 (Miss. 1961).

Since the accused's absence from the anteroom where the attorneys exercised their challenges resulting in the final selection of jurors was voluntary, the accused's right to be present during that phase of the trial was waived, so that the trial court's overruling of a motion for mistrial was not reversible error, especially where no prejudice to defendant was alleged or shown. Brister v. State, 231 Miss. 722, 97 So. 2d 654, 1957 Miss. LEXIS 558 (Miss. 1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069, 1958 U.S. LEXIS 1072 (U.S. 1958).

In murder trial where defendant was in custody he had right to waive his presence at the hearing of motion for new trial. Sims v. State, 209 Miss. 545, 47 So. 2d 849, 1950 Miss. LEXIS 412 (Miss. 1950).

In trial for misdemeanor, accused may, by his own fault or misconduct, waive his right to be present. Jones v. State, 204 Miss. 284, 37 So. 2d 311, 1948 Miss. LEXIS 362 (Miss. 1948).

The presence of the accused may be waived even in capital cases. Hamburg v. State, 203 Miss. 565, 35 So. 2d 324, 1948 Miss. LEXIS 307 (Miss. 1948).

Hearing of motion for a new trial in murder prosecution in absence of defendant in custody was not prejudicial where defendant's counsel waived his presence by failing to object to his absence and examining witnesses on behalf of defendant, and trial judge, aware of defendant's absence, in his discretion did not suspend proceedings. Hamburg v. State, 203 Miss. 565, 35 So. 2d 324, 1948 Miss. LEXIS 307 (Miss. 1948).

Defendant held entitled to waive right to be present on hearing of motion for new trial in felony prosecution, where it was not shown that he was prejudiced thereby. Odom v. State, 172 Miss. 687, 161 So. 141, 1935 Miss. LEXIS 177 (Miss. 1935).

One charged with murder may waive being present part of the time during the trial. Winston v. State, 127 Miss. 477, 90 So. 177, 1921 Miss. LEXIS 246 (Miss. 1921).

3. Time to raise objection.

In murder trial defendant cannot claim error in that he was not present when motion for new trial was heard, where contention was neither mentioned to trial court, nor in assignment of errors nor in original brief, but was mentioned for first time in reply brief on appeal. Sims v. State, 209 Miss. 545, 47 So. 2d 849, 1950 Miss. LEXIS 412 (Miss. 1950).

4. Warning.

Although the trial judge did not verbally warn a defendant that he would be removed from the courtroom for disruptive conduct, the defendant received adequate warning that he would be removed for continued disruptive conduct where he was removed after an initial outburst, he was allowed to cool down, and no proceedings were had in his absence. These occurrences amounted to a warning since the defendant was not unaware that his disruptive conduct was the reason for his first removal and that continued disruption would result in a second removal. Bostic v. State, 531 So. 2d 1210, 1988 Miss. LEXIS 484 (Miss. 1988).

5. Particular circumstances.

Trial court did not err in finding that defendant was absent from the trial voluntarily and in trying him in absentia because defendant had actual knowledge of the trial dates and actually appeared in court before ultimately walking out after his request for a continuance was denied; and there was no merit to defendant's claims that his mental condition caused him to miss the trial involuntarily. Moore v. State, 287 So. 3d 189, 2020 Miss. LEXIS 1 (Miss. 2020).

Trial court did not abuse its discretion in trying defendant in absentia because defendant's absence had been a willful, voluntary, and deliberate attempt to avoid trial as he failed to appear on the date of his scheduled trial after being personally informed of the trial date; and his counsel and the investigator made multiple unsuccessful efforts to contact defendant. Wilson v. State, 267 So. 3d 264, 2019 Miss. LEXIS 152 (Miss. 2019).

Because defendant did not willfully and voluntarily absent himself from the trial, the judge abused his discretion by proceeding with the trial in absentia without first granting a continuance; the judge was aware of defendant's claim that his car had broken down the day before trial, and he lived over 50 miles away, the judge was also aware of defendant's indigent status, there was no evidence contradicting defendant's claim that he was not willingly absent from trial, he did not have any outstanding warrants for his arrest, and he was prejudiced by being tried in absentia. Haynes v. State, 208 So. 3d 4, 2016 Miss. App. LEXIS 804 (Miss. Ct. App. 2016).

It was not plain error to try defendant in absentia because defendant was released on bond and was in default for nonappearance, as defendant knew defendant's trial date, understood defendant had to be there, and did not show defendant's absence was not willful, voluntary, and deliberate. Barksdale v. State, 176 So. 3d 108, 2015 Miss. App. LEXIS 184 (Miss. Ct. App.), cert. denied, 178 So. 3d 333, 2015 Miss. LEXIS 525 (Miss. 2015).

Trial court's failure to hold a competency hearing violated Miss. Unif. Cir. & Cty. R. 9.06 and defendant's constitutional rights and, thus, required reversal of his multiple drug convictions. Whether his absence at trial was the result of willful, voluntary, and deliberate actions could not be answered because the question turned on his competency at the time of trial. Jay v. State, 25 So. 3d 257, 2009 Miss. LEXIS 527 (Miss. 2009).

In his absence, defendant's trial counsel ably cross-examined a detective, made a continuing objection to the introduction of the videotaped interview, and made a closing argument which stressed defendant's theories of the victim's reasons to fabricate her testimony and of his own will being overborne during the interview with the detective. Also, the jury brought back a guilty verdict for only one of the two counts of sexual battery; therefore, defendant was not substantially prejudiced by his absence. Baker v. State, 930 So. 2d 399, 2005 Miss. App. LEXIS 447 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

On the morning scheduled for defendant's DUI trial, defendant and his attorney were asked to return that afternoon; defendant did not return. The trial court did not err in trying defendant in absentia under Miss. Code Ann. § 99-17-9, because defendant's absence was willful, voluntary and deliberate; the jury was properly instructed not to make any assumptions regarding defendant's absence when considering his guilt or innocence. Ali v. State, 2004 Miss. App. LEXIS 1118 (Miss. Ct. App. Dec. 7, 2004), sub. op., op. withdrawn, 928 So. 2d 237, 2006 Miss. App. LEXIS 336 (Miss. Ct. App. 2006).

Trial court did not abuse its discretion in requiring defendant to be present at trial even though defendant had a mental condition that was improved by in-patient treatment; the court rejected defendant's contention that the defense was prejudiced by defendant's appearance as a more "normal" person at trial. Evans v. State, 844 So. 2d 470, 2002 Miss. App. LEXIS 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 483 (Miss. Ct. App. 2003).

Defendant failed to clearly demonstrate an abuse of discretion in the trial court's denying his motion for continuance where there was a dispute between defendant and his counsel over whether defendant had notice of trial. Stidham v. State, 750 So. 2d 1238, 1999 Miss. LEXIS 372 (Miss. 1999).

Based on the facts that (1) the defendant was not present during at least a part of the state's questioning of potential jurors, (2) he did not willfully refuse to show up for trial in an effort to abuse the judicial system, and (3) the trial judge made extraneous comments in the presence of the jury that may have predisposed the jury against him from the very start, the defendant established that he was prejudiced and was entitled to a new trial. Simmons v. State, 746 So. 2d 302, 1999 Miss. LEXIS 246 (Miss. 1999).

The defendant was entitled to a new trial since he showed prejudice resulting from his absence at the commencement of his trial where (1) he was not present during at least a part of the state's questioning of potential jurors, (2) he did not willfully refuse to show up for trial in an effort to abuse the judicial system, and (3) the trial judge made extraneous comments in the presence of the jury that may have predisposed the jury against the defendant from the very start. Simmons v. State, 1999 Miss. LEXIS 179 (Miss. May 13, 1999), op. withdrawn, sub. op., 746 So. 2d 302, 1999 Miss. LEXIS 246 (Miss. 1999).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A trial court abused its discretion by trying 2 defendants in absentia where the defendants were accused of felony possession of marijuana with intent to distribute, the defendants were released on bond, they did not appear at the commencement or at any other stage of the trial, the defense did not announce ready for trial, and the defense counsel's motion for a 30-day continuance based upon the defendants' absence was overruled and the trial was conducted without the defendants' presence. Banos v. State, 632 So. 2d 1305, 1994 Miss. LEXIS 114 (Miss. 1994).

A trial court abused its discretion by trying a defendant in absentia where the defendant was accused of felony possession of marijuana with intent to distribute, the defendant was released on a $50,000 appearance bond following his arrest, he did not appear at the commencement or at any other stage of the trial, the defense did not announce ready for trial, and the defense counsel's motion for a trial continuance of one week was overruled and the trial was conducted as scheduled without the defendant's presence. Sandoval v. State, 631 So. 2d 159, 1994 Miss. LEXIS 14 (Miss. 1994), limited, Jefferson v. State, 807 So. 2d 1222, 2002 Miss. LEXIS 40 (Miss. 2002).

The trial court did not abuse its discretion in ordering a murder trial to proceed in the defendant's absence where defendant, who was present in court when the trial began and the jury was examined, selected and sworn in, was in custody, within the meaning of this section, at the time he voluntarily left the courtroom and escaped. McMillian v. State, 361 So. 2d 495, 1978 Miss. LEXIS 2369 (Miss. 1978).

Accused tried for misdemeanor in his absence when physically unable to attend trial is deprived of his constitutional right to be present, to be heard in his own behalf and to be confronted by witnesses against him. Jones v. State, 204 Miss. 284, 37 So. 2d 311, 1948 Miss. LEXIS 362 (Miss. 1948).

Absence of accused from courtroom when order sustaining motion for special venire was entered, held harmless. Ford v. State, 170 Miss. 459, 155 So. 220, 1934 Miss. LEXIS 160 (Miss. 1934).

Appellate court must presume adjudication to the effect that absent defendant was in default was based on facts then existing supporting judgment. James v. State, 155 Miss. 292, 124 So. 358, 1929 Miss. LEXIS 289 (Miss. 1929).

Where an accused admitted to bail was present at the commencement of his trial but before its conclusion absented himself, the bond would be forfeited and judgment rendered in his absence. Lavins v. State, 3 So. 78 (Miss. 1887).

OPINIONS OF THE ATTORNEY GENERAL

A defendant being tried for third offense DUI, for which jail time is mandatory, must have legal counsel or have made an intelligent waiver thereof; that such a defendant was not present would not make a difference. O'Brien, Dec. 18, 1991, A.G. Op. #91-0930.

When defendant calls in to ask amount of fine for misdemeanor, Court may inform that person what fine will be in case person is found guilty; if defendant does not appear at trial, he or she may be tried in absentia and final judgment and sentence be awarded as though such person were personally present in court. Blakney, July 2, 1992, A.G. Op. #92-0469.

If defendant fails to appear in traffic matter, he can be tried in his absence but burden of proving defendant guilty beyond reasonable doubt requires more than mere introduction of affidavit sworn to by law enforcement officer contained in uniform traffic ticket; there must be testimony in addition to affidavit and ticket. Shirley, Jan. 12, 1994, A.G. Op. #93-1012.

An individual may be tried in absentia for DUI. Belk, Jr., March 24, 2000, A.G. Op. #2000-0126.

An individual may be tried in absentia on a traffic ticket if the individual has been provided proper notice of the date for the appearance and trial and fails to appear or make other arrangements; however, the officer who wrote the ticket must also be present to testify about the offense as the traffic ticket alone in not sufficient to convict an individual of a traffic offense. Arnold, Jan. 11, 2002, A.G. Op. #01-0778.

RESEARCH REFERENCES

ALR.

Voluntary absence of accused when sentence is pronounced. 6 A.L.R.2d 997.

Power to try, in his absence, one charged with misdemeanor. 68 A.L.R.2d 638.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment. 69 A.L.R.2d 835.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 A.L.R.4th 429.

Sufficiency of Showing Defendant's "Voluntary Absence" from Trial for Purposes of State Criminal Procedure Rules or Statutes Authorizing Continuation of Trial Notwithstanding Such Absence. 19 A.L.R. 6th 697.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 1024 et seq.

Law Reviews.

1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

§ 99-17-11. Only two counsel to a side heard.

Only two counsel for the state, one of whom shall be the district attorney, and two for the defendant, shall be heard in criminal cases, unless the court, for special reason, in its discretion, see fit to relax this rule.

HISTORY: Codes, 1857, ch. 64, art. 302; 1871, § 2806; 1880, § 3077; 1892, § 1424; 1906, § 1497; Hemingway's 1917, § 1255; 1930, § 1278; 1942, § 2521.

Cross References — Courts not permitting more than two attorneys to argue on one side in absence of good cause therefor, see § 11-49-9.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2521] has reference to argument of the case to the jury, and does not preclude the employment by interested persons of counsel to assist the district attorney, over defendant's objection. Goldsby v. State, 240 Miss. 647, 123 So. 2d 429, 1960 Miss. LEXIS 488 (Miss. 1960), cert. denied, 365 U.S. 861, 81 S. Ct. 829, 5 L. Ed. 2d 824, 1961 U.S. LEXIS 1468 (U.S. 1961).

The accused in a criminal trial has a right to the time necessary for making his defense fully and fairly, and the trial court has the power to prevent the abuse of such right by limiting the argument within reasonable bounds, but it should be exercised with prudence and caution and the court should be too liberal, rather than unjust, to the accused. Wingo v. State, 62 Miss. 311, 1884 Miss. LEXIS 75 (Miss. 1884).

RESEARCH REFERENCES

ALR.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case. 38 A.L.R.2d 1396.

§ 99-17-13. Variance between indictment and proof; amendment of record and indictment; continuance.

Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, in the name of any county, city, town, village, division, or any other place mentioned in such indictment, or in the name or description of any person or body politic or corporate, therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person, body politic or corporate, therein stated or alleged to be injured or damaged; or intended to be injured or damaged, by the commission of such offense, or in the Christian name or surname, or both, or other description whatever, of any person whomsoever, therein named or described, or in the ownership of any property named or described therein, or in the description of any property or thing, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on the merits, to order such indictment and the record and proceedings in the court to be amended according to the proof, whenever it may be deemed necessary by the court to amend such indictment, record, and proceedings, on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable. After such amendment, the trial shall proceed in the same manner, and with the same consequences in all respects, as if a variance had not occurred; but if the court shall, on application, refuse a continuance, the defendant may take a bill of exceptions thereto, and assign such refusal for error.

HISTORY: Codes, 1871, § 2799; 1880, § 3081; 1892, § 1435; 1906, § 1508; Hemingway's 1917, § 1266; 1930, § 1289; 1942, § 2532.

Cross References — Amendment of indictment or information in case of misnomer or dilatory plea, see § 99-7-19.

Amendment of indictment where person whose name is unknown is afterward found to be known, see § 99-7-25.

Amendment to affidavit, pleading, or proceeding brought up to circuit court from justice of the peace or municipal court, see § 99-35-11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Crime or offense charged.
3. Name.
4. —Of person charged.
5. —Of victim of crime.
6. —Of owner of property.
7. Miscellaneous.
8. Appropriateness of continuance.
9. Time for amendment and objection thereto.

1. In general.

In a forgery prosecution, the fact that the indictment charged that the defendant had intended to defraud certain persons doing business at a store, by the cashing of a forged check, while a witness on cross-examination remarked that the business was a corporation, did not constitute a material variance, for there was not even a remote chance that such inconsistency could result in subjecting the defendant to another prosecution. Smith v. State, 222 So. 2d 688, 1969 Miss. LEXIS 1550 (Miss. 1969).

This section [Code 1942, § 2532] is not applicable where the indictment contains no allegation concerning the matter offered in evidence. Langford v. State, 239 Miss. 483, 123 So. 2d 614, 1960 Miss. LEXIS 311 (Miss. 1960).

The constitutional provision requiring that an accused be advised of the offense charged, does not prohibit an amendment which does not deprive the accused of any substantial right necessary to the ends of justice. Gillespie v. State, 221 Miss. 116, 72 So. 2d 245, 1954 Miss. LEXIS 519 (Miss. 1954).

Where an amendment to an indictment charging the receipt of stolen goods did not vary the description but merely supplemented it, the amendment did not constitute a new case or a new description which would prevent the accused from understanding the offense with which he was charged. Jones v. State, 215 Miss. 355, 60 So. 2d 805, 1952 Miss. LEXIS 573 (Miss. 1952).

The state may amend an indictment so as to show correctly the style of the case referred to in the indictment. Clanton v. State, 210 Miss. 700, 50 So. 2d 567, 1951 Miss. LEXIS 308 (Miss. 1951).

If the variance between the indictment and proof is not harmful to the defendant and the defendant has been informed by the indictment of the nature and cause of the crime the variance is immaterial. Sanders v. State, 141 Miss. 289, 105 So. 523, 1925 Miss. LEXIS 188 (Miss. 1925).

The statute is constitutional; it however confers a delicate power which should be employed cautiously with scrupulous regard to the defense on the merits, and on such terms as will preclude the possibility of harm. Miller v. State, 53 Miss. 403, 1876 Miss. LEXIS 87 (Miss. 1876); Peebles v. State, 55 Miss. 434, 1877 Miss. LEXIS 155 (Miss. 1877).

2. Crime or offense charged.

Instructing jury on armed robbery, after indictment charged robbery, constituted formal rather than substantive amendment to indictment, and thus any variance which existed between indictment and proof was harmless error, where all defenses and evidence available to defendant remained equally applicable, and jury could not have convicted defendant of armed robbery and found him not guilty of robbery, inasmuch as armed robbery is simply robbery with weapon. Davis v.

State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

The State may amend an indictment during trial to change the offense, if the amended offense is a pure lesser included offense of the original indicted charge. Holmes v. State, 660 So. 2d 1225, 1995 Miss. LEXIS 274 (Miss. 1995).

An amendment may be made to state truly and describe accurately the particular and identical offense for which the grand jury indicted. Gillespie v. State, 221 Miss. 116, 72 So. 2d 245, 1954 Miss. LEXIS 519 (Miss. 1954).

If a material element of the crime or a necessary negation be omitted, the indictment cannot by authority of the statute be amended so as to cure the defect. Kline v. State, 44 Miss. 317, 1870 Miss. LEXIS 114 (Miss. 1870); Kemp v. State, 121 Miss. 580, 83 So. 744, 1920 Miss. LEXIS 106 (Miss. 1920).

3. Name.

This section allows for the amendment of an indictment to change a name, so long as the defendant is not prejudiced and such variance is not material to the merits of the case. Baldwin v. State, 732 So. 2d 236, 1999 Miss. LEXIS 76 (Miss. 1999).

Amendment to an indictment, after state had closed its case in an uttering a forgery trial, to show that a named person was a part owner, instead of agent, of store which had received check, was one of form, not of substance, and would not support defendant's motion for a directed verdict. Burt v. State, 493 So. 2d 1325, 1986 Miss. LEXIS 2490 (Miss. 1986).

With respect to amendments seeking to change the name or description of a person to which the indictment refers, changes which conform the indictment so as to correctly name the person intended by the grand jury are allowable; however, if the amendment results in changing the identity of the person, so as to name a person other than the one intended by the grand jury, it is a substantive change and is not allowable. Parchman v. State, 279 So. 2d 602, 1973 Miss. LEXIS 1471 (Miss. 1973).

No reversible error was committed by trial court in permitting the indictment to be amended by changing the first name of the alleged purchaser of marijuana without an order authorizing it actually being entered on the minutes of the court, where defendant failed to note any objection or complaint about the amendment during the trial and the record affirmatively showed the absence of any objection to the amendment as made. Hammond v. Dubard, 279 So. 2d 594, 1973 Miss. LEXIS 1467 (Miss. 1973).

In prosecution for burglary, where defendant knew that the property he was charged with having stolen was a spool of barbed wire, an amendment to indictment inserting therein "USS Lyman" as part of the description of the wire instead of "J & L" as stated in the indictment, defendant was not injured or prejudiced by that amendment. Andrews v. State, 220 Miss. 28, 70 So. 2d 40, 1954 Miss. LEXIS 403 (Miss. 1954).

If the question of variance between the indictment for uttering of a forgery and the proof for the reason that the indictment charges a different name from the proof offered, was raised in the lower court, the indictment could have been amended. Kellum v. State, 213 Miss. 579, 57 So. 2d 316, 1952 Miss. LEXIS 399 (Miss. 1952).

Variance in indictment for perjury with proof as to issue between different parties would be amendable, and, after verdict cured by statute. Slade v. State, 119 So. 355 (Miss. 1928).

Amending indictment for uttering forgery by changing name of payee of check to conform to proof held not error. Graves v. State, 148 Miss. 62, 114 So. 123, 1927 Miss. LEXIS 9 (Miss. 1927).

4. —Of person charged.

The defendant, W. J. Lee, was indicted under the name of W. L. Lee and the evidence clearly indicated that W. J. Lee was the person indicted and he was not misled by the error in his initials. The court held the error immaterial. Lee v. State, 138 Miss. 474, 103 So. 233, 1925 Miss. LEXIS 102 (Miss. 1925).

An amendment may be made to an indictment so as to give the correct Christian name of the accused. Smith v. State, 103 Miss. 356, 60 So. 330, 1912 Miss. LEXIS 179 (Miss. 1912).

Where an error as to the name of the defendant in an indictment is plainly apparent from its face being a mere clerical misprision, it may be amended by the district attorney without the consent of the grand jury of this section [Code 1942, § 2532]. Orr v. State, 81 Miss. 130, 32 So. 998, 1902 Miss. LEXIS 138 (Miss. 1902).

Identity of name is not essential and amendments can be made therein, but identity of the offense and of the person is essential and cannot be amended. Blumenberg v. State, 55 Miss. 528, 1878 Miss. LEXIS 3 (Miss. 1878).

5. —Of victim of crime.

In a business burglary case, the indictment, despite misspelling the name of the store where the burglary took place, was sufficient. Cridiso v. State, 956 So. 2d 281, 2006 Miss. App. LEXIS 745 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

Changing the name of the victim or adding the name of the employer of the victim does not change the elements of grand larceny which the state has the burden of proving to obtain a conviction and, therefore, is only a matter of form. Stradford v. State, 771 So. 2d 390, 2000 Miss. App. LEXIS 515 (Miss. Ct. App. 2000).

A motion to amend the indictment to change the name of the victim from "Tom Seese" to "Tim Seese" was not a material variance on the face of the indictment when the amendment did not alter the criminal charge brought against the defendant. Burks v. State, 770 So. 2d 960, 2000 Miss. LEXIS 232 (Miss. 2000).

The trial court did not err when it allowed the state to amend the indictment in a murder prosecution to state the victim's actual name "a/k/a" his nickname, rather than stating just his nickname, since the defendant was not confused as to the identity of the person he was accused of killing and did not have to alter his defense. Burson v. State, 756 So. 2d 830, 2000 Miss. App. LEXIS 36 (Miss. Ct. App. 2000).

Amendment of indictment deleting from it name of one alleged victim was impermissible in that it went to substance rather than form, where by amendment state was allowed to delete essential element of crime which had chosen to prosecute. Reed v. State, 506 So. 2d 277, 1987 Miss. LEXIS 2483 (Miss. 1987).

Ineffective amendment of indictment does not require reversal of conviction where multiple charges were submitted to jury and charges against defendant as to armed robberies of victims who were not deleted from indictment were separable from charge against victim who was deleted from indictment and court was of opinion that jury had not considered charge against deleted victim since juries are presumed to follow instructions given by trial judge. Reed v. State, 506 So. 2d 277, 1987 Miss. LEXIS 2483 (Miss. 1987).

Amendment to an indictment changing the name of the victim from "Harmon" Rainey to "Grady" Rainey, was allowable where both Harmon and the county prosecutor testified that the grand jury intended to indict the defendant for shooting brother Grady and that the placing of Harmon's name on the indictment was a mistake. Parchman v. State, 279 So. 2d 602, 1973 Miss. LEXIS 1471 (Miss. 1973).

Trial court did not commit reversible error in granting state's motion to amend an indictment, charging the accused with breaking and entering with a felonious intent to commit rape, to show that the female involved was another girl, who had the same surname but a different Christian name from that of the girl stated in the indictment. McDole v. State, 229 Miss. 646, 91 So. 2d 738, 1957 Miss. LEXIS 308 (Miss. 1957).

Where an indictment which charged the defendant with murder incorrectly spelled the name of the deceased, it was proper for the court to sustain a motion of district attorney for leave to amend the indictment so as to correctly spell the name of the deceased. Belina v. State, 228 Miss. 330, 87 So. 2d 919, 1956 Miss. LEXIS 520 (Miss.), cert. denied, 352 U.S. 936, 77 S. Ct. 233, 1 L. Ed. 2d 166, 1956 U.S. LEXIS 164 (U.S. 1956).

Where there was a clerical mistake in an indictment for murder as to deceased's Christian name, permitting of the amendment of the indictment prior to trial did not prejudice the defendant inasmuch as the offense charged in the indictment was not changed. Gillespie v. State, 221 Miss. 116, 72 So. 2d 245, 1954 Miss. LEXIS 519 (Miss. 1954).

Variance between indictment and proof of name of owner of stolen car was amendable at trial, where evidence clearly showed identity of offense charged would not have thereby changed. Horn v. State, 165 Miss. 169, 147 So. 310, 1933 Miss. LEXIS 293 (Miss. 1933).

Amendment to indictment during trial to charge that "man" J. was killed instead of "Ernest" J., held permissible. Davis v. State, 150 Miss. 797, 117 So. 116, 1928 Miss. LEXIS 160 (Miss. 1928).

An indictment for obtaining money under false pretense from partnership held not defective because alleging members of the partnership by initial preceding their surname, but if defect is made to appear to the court the names of partners can be written in by amendment. State v. Grady, 147 Miss. 446, 111 So. 148, 1927 Miss. LEXIS 272 (Miss. 1927).

There is no variance between the proof and the indictment merely because the person killed has two names including the name alleged in the indictment. Woulard v. State, 137 Miss. 808, 102 So. 781, 1925 Miss. LEXIS 23 (Miss. 1925).

A case where the name of the party defrauded may be changed by amendment. McGuire v. State, 91 Miss. 151, 44 So. 802, 1907 Miss. LEXIS 140 (Miss. 1907).

An amendment is permissible as to the name of the murdered person. Miller v. State, 68 Miss. 221, 8 So. 273, 1890 Miss. LEXIS 12 (Miss. 1890); Thurmond v. State, 94 Miss. 1, 47 So. 434, 1908 Miss. LEXIS 5 (Miss. 1908).

An amendment is permissible as to the name of the injured party in prosecution for assault with intent to kill. Miller v. State, 53 Miss. 403, 1876 Miss. LEXIS 87 (Miss. 1876); Wood v. State, 64 Miss. 761, 2 So. 247, 1887 Miss. LEXIS 103 (Miss. 1887).

6. —Of owner of property.

Trial court did not err in allowing the State to amend an indictment to correct the name of the owner of the dwelling that defendant was charged with burglarizing; the amendment to the indictment was a matter of simple form and effected no material change in the offense defendant was accused of committing. Tubby v. State, 65 So. 3d 846, 2010 Miss. App. LEXIS 583 (Miss. Ct. App. 2010), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 340 (Miss. 2011).

The amendment of an indictment for burglary to conform to testimony concerning the owner of the property burglarized was permissible. Pearson v. State, 740 So. 2d 346, 1999 Miss. App. LEXIS 179 (Miss. Ct. App. 1999).

The amendment of the original indictment, during the course of an armed robbery trial, to correct the corporate name of the owner of the robbed store was proper. Evans v. State, 499 So. 2d 781, 1986 Miss. LEXIS 2825 (Miss. 1986).

An indictment for burglary may be amended before trial as to the ownership of the property. Kelly v. State, 239 Miss. 683, 124 So. 2d 840, 1960 Miss. LEXIS 341 (Miss. 1960).

Failure of an indictment charging embezzlement to allege the ownership of the embezzled property is not waived by failure to demur. Langford v. State, 239 Miss. 483, 123 So. 2d 614, 1960 Miss. LEXIS 311 (Miss. 1960).

In a grand larceny prosecution for the theft of certain cattle, where a variance between the proof and indictment existed as to whether the cattle were owned by a partnership or corporation, the variance was an amendable defect. Mills v. State, 231 Miss. 641, 97 So. 2d 386, 1957 Miss. LEXIS 548 (Miss. 1957).

Allowance of amendment to an indictment for burglary to show the name of the true possessor and operator of the warehouse and owner of the business, was a protection for the accused against another prosecution for the same crime. Andrews v. State, 220 Miss. 28, 70 So. 2d 40, 1954 Miss. LEXIS 403 (Miss. 1954).

Where an indictment charged defendant with permitting gambling in a roadhouse of which he was the owner, an amendment eliminating the word "owner" and substituting therefor the word "occupant," was proper inasmuch as there was no change in the offense charged. Hearn v. State, 219 Miss. 412, 69 So. 2d 223, 1954 Miss. LEXIS 348 (Miss. 1954).

In prosecution for grand larceny where the defendant pleaded not guilty, and where the indictment alleged stolen property to be personalty of Hattiesburg Hardware Stores, instead of that of a Mississippi corporation of like name, the indictment was not fatal where the accused made no request for directed verdict and made no suggestion of variance between the indictment and the proof, and did not file a demurrer to the indictment. Wiggins v. State, 215 Miss. 441, 61 So. 2d 145, 1952 Miss. LEXIS 583 (Miss. 1952).

Failure of an indictment for burglary to contain the required allegation as to the ownership of the property claimed to have been burglarized is not a variance, and so does not render applicable a statutory provision permitting an amendment to an indictment in the discretion of the court, whenever, on the trial of the indictment, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof. Crosby v. State, 191 Miss. 173, 2 So. 2d 813, 1941 Miss. LEXIS 155 (Miss. 1941).

Variance in a prosecution for grand larceny between the indictment and proof as to the Christian name of the owner of the stolen property was waived where the defendant made no specific objection thereto at any stage of the trial but only sought to do so by peremptory instructions. Saucier v. Life & Casualty Ins. Co., 189 Miss. 693, 198 So. 625, 1940 Miss. LEXIS 155 (Miss. 1940).

Amendment of indictment during trial as to ownership of storehouse burglarized held permissible. Osser v. State, 165 Miss. 680, 145 So. 754, 1933 Miss. LEXIS 277 (Miss. 1933).

In burglary prosecution, amendment of indictment to show correct name of corporation owning hotel burglarized, held permissible. Wood v. State, 155 Miss. 298, 124 So. 353, 1929 Miss. LEXIS 287 (Miss. 1929).

In larceny prosecution, permitting premature amendment showing correct name of owner of calf stolen, held harmless. Amendment changing name of owner of stolen calf from L. H. to L. T. held permissible where evidence showed it was calf grand jury had in mind. Collier v. State, 154 Miss. 446, 122 So. 538, 1929 Miss. LEXIS 153 (Miss. 1929).

Under an affidavit for maliciously shooting a horse belonging to one person it is error to amend so as to allege ownership in another person. White v. State, 95 Miss. 75, 48 So. 611, 1909 Miss. LEXIS 221 (Miss. 1909).

The name of the owner of the property was amended in the following cases: Haywood v. State (1872) 47 Miss 1. Garvin v. State, 52 Miss. 207, 1876 Miss. LEXIS 200 (Miss. 1876); Murrah v. State, 51 Miss. 652, 1875 Miss. LEXIS 90 (Miss. 1875); Knight v. State, 64 Miss. 802, 2 So. 252, 1887 Miss. LEXIS 108 (Miss. 1887).

A new trial will not be granted for newly-discovered evidence that the property stolen was not as averred the property of "Lewis Thompson," but was the property of "Mrs. E. H. Tany," because if the fact had been proved the indictment could have been amended accordingly. Foster v. State, 52 Miss. 695, 1876 Miss. LEXIS 277 (Miss. 1876).

7. Miscellaneous.

No prejudice could have occurred to defendant by allowing the State to amend the indictment against defendant to reflect that the money defendant took from a victim's wallet actually belonged to the owner of the store at which the victim worked, rather than the victim Johnson v. State, 9 So. 3d 413, 2008 Miss. App. LEXIS 596 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 221 (Miss. 2009).

Where defendant was indicted for attempting to break and enter a dwelling house, the trial court committed reversible error by allowing the State to amend the indictment to change the charge from "attempt to break and enter" to "break and enter." Defendant was clearly prejudiced because the defense that he had actually completed the crime was no longer available to him. Spears v. State, 942 So. 2d 812, 2005 Miss. App. LEXIS 735 (Miss. Ct. App. 2005), rev'd, 942 So. 2d 772, 2006 Miss. LEXIS 656 (Miss. 2006).

The trial court's failure to subsequently amend the indictment against the defendant to correct its erroneous assertion that the defendant sold drugs at a residence in the City of Sallis, Mississippi, when, in fact, his residence was in rural

Attala County, worked no prejudice to the defendant and was, therefore, harmless. Jenkins v. State, 1999 Miss. App. LEXIS 301 (Miss. Ct. App. May 18, 1999), aff'd, 759 So. 2d 1229, 2000 Miss. LEXIS 123 (Miss. 2000).

The trial court committed reversible error by allowing the prosecution to circumvent the grand jury by amending the indictment in a prosecution for kidnapping to delete the word "secretly" from the phrase "with the intent to cause the victim to be secretly confined and held against her will" since such amendment deleted an element of the offense charged, and in the process omitted one of the defenses otherwise available to the defendant. Only the grand jury could make such a substantive change to the indictment. Chevalier v. State, 730 So. 2d 1111, 1998 Miss. LEXIS 620 (Miss. 1998), overruled in part, Conley v. State, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

The state was properly permitted to amend the murder indictment of the defendant to include the words "with design" since the offense for which the defendant was indicted was not changed by the amendment due to the express language of the statute; the offense was the same regardless of the defendant's intent. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

An indictment's formal defect in failing to conclude with the words, "against the peace and dignity of the State of Mississippi," is curable by amendment; thus, such a defect is subject to waiver for the failure to demur to the indictment in accordance with § 99-7-21. Brandau v. State, 662 So. 2d 1051, 1995 Miss. LEXIS 301 (Miss. 1995).

The word "distribute" includes transactions which are sales as well as transactions which may not be considered sales; thus, there was no material variance between an indictment and the evidence offered at trial where the defendant was indicted for distribution of a controlled substance and the proof evinced a sale of a controlled substance. Rogers v. State, 599 So. 2d 930, 1992 Miss. LEXIS 123 (Miss.), overruled in part, Mayfield v. State, 612 So. 2d 1120, 1992 Miss. LEXIS 861 (Miss. 1992).

In a prosecution for aggravated assault under § 97-3-7, the defendant's conviction would be reversed where the grand jury returned the indictment under § 97-3-7(2)(b), which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under § 97-3-7(2)(a), which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. Quick v. State, 569 So. 2d 1197, 1990 Miss. LEXIS 662 (Miss. 1990).

An amendment of an indictment which charged the defendant as a habitual offender under § 99-19-81 rather than § 99-19-83, which imposes a greater sentence than does § 99-19-81, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Nathan v. State, 552 So. 2d 99, 1989 Miss. LEXIS 470 (Miss. 1989).

The amendment of an indictment during the course of an armed robbery trial to change the amount of the money stolen during the course of the robbery was one of form and not of substance, and was proper. Evans v. State, 499 So. 2d 781, 1986 Miss. LEXIS 2825 (Miss. 1986).

In a prosecution for armed robbery, the trial court did not err in allowing the state to amend the indictment to change the amount from $5,000 to $1,700. This amendment was of form and not of substance, and was properly allowed under this section and Code 1972 § 99-7-21. Sanders v. State, 313 So. 2d 398, 1975 Miss. LEXIS 1673 (Miss. 1975).

Variance was not fatal when considered with facts of case, where indictment alleged that defendant concealed a.22 caliber pistol, but proof showed that it was in fact a.25 caliber pistol. Morgan v. United States Fidelity & Guaranty Co., 291 So. 2d 741, 1974 Miss. LEXIS 1749 (Miss. 1974).

A trial court cannot amend an indictment so as to change the charge made in the indictment to another crime, except by the action of the grand jury who returned the indictment. Jones v. State, 279 So. 2d 650, 1973 Miss. LEXIS 1490 (Miss. 1973).

Where an indictment originally charged the theft of a number of articles of personal property, and at the trial the district attorney asked leave to amend the indictment by eliminating all but four of the articles listed, and the accused claimed surprise and asked for a continuance on the ground that he had prepared to meet the indictment and had a witness who would testify that some of the articles eliminated by the amendment were not in fact stolen, the amendment was properly permitted and the motion for continuance was properly denied. Stevens v. State, 232 So. 2d 730, 1970 Miss. LEXIS 1641 (Miss. 1970).

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. Vickers v. State, 215 So. 2d 432, 1968 Miss. LEXIS 1364 (Miss. 1968).

In prosecution for larceny of a calf, amendment of an indictment by the addition of "red" in the description of the calf is expressly authorized by this section [Code 1942, § 2532]. Shipp v. State, 215 Miss. 541, 61 So. 2d 329, 1952 Miss. LEXIS 596 (Miss. 1952), but see Addkison v. State, 608 So. 2d 304, 1992 Miss. LEXIS 452 (Miss. 1992).

Variance between charge of assault with brass knucks and proof of assault with crutch did not require amendment. Roney v. State, 153 Miss. 290, 120 So. 445, 1929 Miss. LEXIS 10 (Miss. 1929).

An instance where an amendment may be made alleging the proper venue. Winston v. State, 101 Miss. 101, 57 So. 545, 1911 Miss. LEXIS 108 (Miss. 1911).

Where an indictment for retailing charged defendant with selling to an individual named "and to divers other persons," the court was authorized to permit an amendment which erased the words quoted. Rocco v. State, 37 Miss. 357, 1859 Miss. LEXIS 24 (Miss. 1859).

8. Appropriateness of continuance.

Trial court did not err in denying defendant a continuance in order to prepare a defense to the amended charge where there was no evidence that the defendant was prejudiced either by the amendment or by the refusal of the court to grant the continuance. Hudson v. State, 311 So. 2d 648, 1975 Miss. LEXIS 1617 (Miss. 1975).

If a defendant does not ask for a continuance upon the amendment of the indictment, he cannot afterward object that he was surprised and prejudiced in his defense thereby. Peebles v. State, 55 Miss. 434, 1877 Miss. LEXIS 155 (Miss. 1877).

9. Time for amendment and objection thereto.

An amendment to an indictment entered after the trial in vacation is a nullity. Jones v. State, 279 So. 2d 650, 1973 Miss. LEXIS 1490 (Miss. 1973).

In an indictment for larceny of a cow where there is a variance between the indictment and the proof as to ownership of the cow objection should be made thereto specifically during the trial and after verdict it is too late to raise the objection. Smith v. State, 112 Miss. 248, 72 So. 929, 1916 Miss. LEXIS 98 (Miss. 1916).

An indictment of a woman for infanticide describing the persons killed as "two certain human beings, the same being her (the defendant's) children," is good after verdict because of the provisions of Code 1892, §§ 1341, 1354, 1435 [Code 1942, §§ 2436, 2449, 2532]. Wilkinson v. State, 77 Miss. 705, 27 So. 639, 1900 Miss. LEXIS 24 (Miss. 1900).

RESEARCH REFERENCES

ALR.

Necessity and materiality of statement of place of death in indictment or Information charging homicide. 59 A.L.R.2d 901.

Amendment of indictment or information with respect to name or capacity of person alleged to have been victim of crime as ground for continuance. 85 A.L.R.2d 1204.

Am. Jur.

41 Am. Jur. 2d, Indictments and Informations §§ 252 et seq.

§ 99-17-15. Variance between indictment and proof; amendment of record and indictment; order for amendment.

The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13 shall be entered on the minutes, and shall specify precisely the amendment, and shall be a part of the record of said case, and shall have the same effect as if the indictment or other proceeding were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment.

HISTORY: Codes, 1880, § 3082; 1892, § 1436; 1906, § 1509; Hemingway's 1917, § 1267; 1930, § 1290; 1942, § 2533.

Cross References — Amendment of indictment or information in case of misnomer or dilatory plea, see § 99-7-19.

Amendment of indictment where person whose name is unknown is afterward found to be known, see § 99-7-25.

Amendment to affidavit, pleading or proceeding brought up to circuit court from justice of the peace or municipal court, see § 99-35-11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Entered on the minutes.
3. Failure to object.

1. In general.

An amendment to an indictment entered after the trial in vacation is a nullity. Jones v. State, 279 So. 2d 650, 1973 Miss. LEXIS 1490 (Miss. 1973).

A trial court cannot amend an indictment so as to change the charge made in the indictment to another crime, except by the action of the grand jury who returned the indictment. Jones v. State, 279 So. 2d 650, 1973 Miss. LEXIS 1490 (Miss. 1973).

Where an indictment charged defendant with permitting gambling in a roadhouse of which he was the owner an amendment eliminated the word "owner" and substituted therefor the word "occupant," and this amendment clearly showed the exact nature of the offense for which defendant was being tried, as did the state's principal instruction, and jury had proper guide before it without a copy of order allowing the amendment, the attachment of the copy of the order allowing the amendment was not necessary. Hearn v. State, 219 Miss. 412, 69 So. 2d 223, 1954 Miss. LEXIS 348 (Miss. 1954).

When order permitting amendment of indictment is made, it is unnecessary that trial be suspended until clerk records order on minutes. Thomas v. State, 167 Miss. 504, 142 So. 507, 1932 Miss. LEXIS 205 (Miss. 1932).

2. Entered on the minutes.

Defendant waived the issue of whether an amendment to the indictment was illegal because the order to amend the indictment was never entered into the minutes. Wallace v. State, 166 So. 3d 520, 2014 Miss. App. LEXIS 385 (Miss. Ct. App. 2014), cert. dismissed, — So. 3d —, 2015 Miss. LEXIS 341 (Miss. 2015).

Attempted amendment was ineffective where no valid order was entered on the record authorizing alleged amendment. Reed v. State, 506 So. 2d 277, 1987 Miss. LEXIS 2483 (Miss. 1987).

An attempted amendment of an indictment charging defendant with uttering a forged check to a division of a foreign corporation, in order to correctly list the corporation's name, was of no effect, since there was no order authorizing the amendment placed on the minutes of the court nor was the amendment made on the face of the indictment in compliance with this section; however, there was no variance between the indictment as it was originally drawn and the proof, since the identity of the company intended to be defrauded was clearly set forth and the identity of the foreign corporation of which it was a division was merely surplusage. Sturgis v. State, 379 So. 2d 534, 1980 Miss. LEXIS 1827 (Miss.), cert. denied, 449 U.S. 825, 101 S. Ct. 87, 66 L. Ed. 2d 28, 1980 U.S. LEXIS 2696 (U.S. 1980).

In a prosecution for grand larceny, where the testimony showed that a common carrier had the property in its possession for transportation from consignors to consignees who were the owners of the property, the freight line was a common carrier bailee in rightful possession of the property and there was no fatal variance between the proof and the indictment as originally written charging that the articles of personal property alleged to have been stolen were the property of the common carrier; therefore, the failure to write into the minutes the order of the trial court permitting the amendment of the indictment to allege that the personal property belonged to the main consignees was not fatal. Mahfouz v. State, 303 So. 2d 461, 1974 Miss. LEXIS 1438 (Miss. 1974).

Where there was a variance between the indictment and proof in prosecution for receiving stolen property, and the trial judge sustained a motion for amendment of the indictment, but there was no written order for the amendment entered on the minutes, the variance was not eliminated by the action of the court in sustaining the motion. Hitt v. State, 217 Miss. 61, 63 So. 2d 665, 1953 Miss. LEXIS 411 (Miss. 1953).

Where the order of the court allowing an amendment to the indictment was entered on the minutes, this effects precisely the amendment to be made, in a murder prosecution, the presumption was in the absence of a showing to the contrary, that the district attorney did not actually amend the indictment until the order allowing him to do so had been entered on the minutes. Holloway v. State, 187 Miss. 238, 192 So. 450, 1939 Miss. LEXIS 107 (Miss. 1939).

Amendment to indictment must be by order of court which must precisely specify amendment, and order must be spread on minutes. Thomas v. State, 167 Miss. 504, 142 So. 507, 1932 Miss. LEXIS 205 (Miss. 1932).

Permitting prosecuting attorney to amend the indictment, during murder trial, by changing name of alleged deceased without order on minutes, held reversible error. Davis v. State, 150 Miss. 797, 117 So. 116, 1928 Miss. LEXIS 160 (Miss. 1928).

An amendment to the indictment must be by order of the court entered on minutes and for an amendment otherwise made the indictment should be quashed. Shurley v. State, 90 Miss. 415, 43 So. 299, 1907 Miss. LEXIS 50 (Miss. 1907).

An indictment changed by the prosecuting attorney without authority entered on the minutes of the court should be quashed. Shurley v. State, 90 Miss. 415, 43 So. 299, 1907 Miss. LEXIS 50 (Miss. 1907).

3. Failure to object.

In a prosecution for manslaughter in which the trial court permitted the state to amend the face of the indictment by adding the word "Jr." to the name of the victim, any error was waived by the defendant where no point was made at that time to the trial judge that an order authorizing the amendment had not been placed on the minutes as provided by this section and where, in his motion for a new trial, the defendant had failed to assign this error. Dunaway v. State, 398 So. 2d 658, 1981 Miss. LEXIS 2015 (Miss. 1981).

No reversible error was committed by trial court in permitting the indictment to be amended by changing the first name of the alleged purchaser of marijuana without an order authorizing it actually being entered on the minutes of the court, where defendant failed to note any objection or complaint about the amendment during the trial and the record affirmatively showed the absence of any objection to the amendment as made. Hammond v. Dubard, 279 So. 2d 594, 1973 Miss. LEXIS 1467 (Miss. 1973).

§ 99-17-17. Joint defendants are competent witnesses for one another in separate trials.

Where parties jointly indicted are tried separately, the party not on trial, shall, in all cases, be a competent witness for the party being tried.

HISTORY: Codes, 1880, § 3071; 1892, § 1420; 1906, § 1493; Hemingway's 1917, § 1251; 1930, § 1274; 1942, § 2517.

Cross References — Severance of joint indictments in felonies, see § 99-15-47.

JUDICIAL DECISIONS

1. In general.

A trial court's failure to instruct the jurors in an armed robbery prosecution to view accomplices' testimony with caution and suspicion constituted reversible error where there was no physical evidence corroborating the accomplices' testimony, the armed robbery went unsolved for over 5 years, one of the accomplices who testified as a witness was granted absolute immunity in exchange for his testimony and also admitted to committing at least 25 felonies, and the other accomplice had entered a plea of not guilty to the charge of armed robbery, which he confessed to committing in his testimony, and had not yet gone to trial. An instruction given by the trial court directing the jury to consider accomplice testimony with "great care and caution" was insufficient since the difference between being told to exercise "great care" and to regard with "suspicion" is a difference of vast degree; in deleting the requirement to view accomplices' testimony with suspicion, the trial judge effectively diluted the instruction. Wheeler v. State, 560 So. 2d 171, 1990 Miss. LEXIS 197 (Miss. 1990).

RESEARCH REFERENCES

ALR.

Receiver of stolen goods as accomplice of thief for purposes of corroboration. 74 A.L.R.3d 560.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 A.L.R.4th 192.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in criminal trial. 17 A.L.R. Fed. 249.

§ 99-17-19. Assaults; insulting words admissible.

In all trials for assault and battery, or for an assault, the defendant may give in evidence, in excuse or justification, any insulting words used by the person on whom the assault or assault and battery was committed, at the time of the commission thereof, toward the defendant, and the jury may consider and determine whether such words were or were not a sufficient excuse for or justification of the offense committed.

HISTORY: Codes, 1857, ch. 64, art. 366; 1871, § 2871; 1880, § 3080; 1892, § 1428; 1906, § 1501; Hemingway's 1917, § 1259; 1930, § 1282; 1942, § 2525.

Cross References — Insulting words as actionable, see § 95-1-1.
Criminal offense of assault and battery generally, see §§ 97-3-7 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Insulting words as justification.
3. Punitive damages.

1. In general.

The statute applies to defense in civil as well as criminal prosecutions. Choate v. Pierce, 126 Miss. 209, 88 So. 627, 1921 Miss. LEXIS 25 (Miss. 1921); Holliman v. Lucas, 202 Miss. 463, 32 So. 2d 259, 1947 Miss. LEXIS 299 (Miss. 1947).

The plea of justification in an action for assault does not entitle the defendant to open and close the case before the jury. Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409, 1919 Miss. LEXIS 162 (Miss. 1919).

2. Insulting words as justification.

Insulting words can never justify a homicide, unless they are of such nature as to cause defendant to believe he is threatened with grave, impending danger. Reed v. State, 197 So. 2d 811, 1967 Miss. LEXIS 1544 (Miss. 1967).

An instruction in an assault action as to the permissibility of a finding for plaintiff need not predicate absence of justification by insulting words where, under the evidence, justification is not an issue; nor need it exclude self-defense where the evidence shows that plaintiff was attacked by defendant while conversing with another. Pittman v. Partin, 236 Miss. 517, 111 So. 2d 238, 1959 Miss. LEXIS 345 (Miss. 1959).

Right to strike one using insulting words is not given accused by this section [Code 1942, § 2525], but jury may consider and determine whether words used were or were not a sufficient excuse for or justification of offense committed. Herron v. State, 38 So. 2d 720 (Miss. 1949).

This statute places it within the right and province of the jury to determine whether or not the language employed against a defendant is a sufficient excuse or justification for committing an assault and battery without the use of a deadly weapon. Holliman v. Lucas, 202 Miss. 463, 32 So. 2d 259, 1947 Miss. LEXIS 299 (Miss. 1947).

Whether this section [Code 1942, § 2525] is applicable in manslaughter cases will not be decided on assignment of error directed to instruction for state to effect that if jury believes from evidence that deceased cursed defendant, calling him vile names, defendant had right to strike deceased, when accused procured another instruction properly submitting this issue but was convicted in spite of instruction. Holliman v. Lucas, 202 Miss. 463, 32 So. 2d 259, 1947 Miss. LEXIS 299 (Miss. 1947).

Insulting words do not of themselves justify assault; a defendant must justify the assault by the words. Baker v. State, 192 Miss. 406, 6 So. 2d 315, 1942 Miss. LEXIS 35 (Miss. 1942).

The gist of justification, caused by insulting words, is in the mind and reaction of the defendant, who must himself connect the incentive to the act to produce provocation. Baker v. State, 192 Miss. 406, 6 So. 2d 315, 1942 Miss. LEXIS 35 (Miss. 1942).

The jury, in a prosecution on a charge of assault, may consider whether insulting words used were a sufficient justification, but only when given "in evidence in excuse or justification." Baker v. State, 192 Miss. 406, 6 So. 2d 315, 1942 Miss. LEXIS 35 (Miss. 1942).

Where, in a prosecution on a charge of assault, the defendant testified that he struck the victim because "he had his hands behind him and advancing on me in a threatening manner," and did not claim to have struck him because of insulting remarks made by the victim, the defendant was not entitled to an instruction that under the law insulting words could justify an assault, and that if the jury had a reasonable doubt but that the victim applied to the defendant the term "you are a damn liar," and that such language justified an assault, then it was their duty to render a verdict of not guilty, such words not being given in evidence in justification, but being a mere incident of the assault. Baker v. State, 192 Miss. 406, 6 So. 2d 315, 1942 Miss. LEXIS 35 (Miss. 1942).

Where prosecuting witness threatened to whip whoever took his automobile shift keys and defendant, convicted of assault, procured and returned keys, but refused to disclose who took them, stated that he would take it on himself, and asked what prosecuting witness was going to do about it, whereupon prosecuting witness struck defendant, defendant's statements did not constitute assault and did not make him the aggressor, as regards question of self-defense. Herrington v. State, 177 Miss. 837, 172 So. 129, 1937 Miss. LEXIS 158 (Miss. 1937).

Under this section [Code 1942, § 2525] the jury has the right to determine whether the insulting words were sufficient excuse for the original assault and an instruction denying the jury this privilege is erroneous. Wicker v. State, 107 Miss. 690, 65 So. 885, 1914 Miss. LEXIS 133 (Miss. 1914).

Under Code 1892, § 1428 [Code 1942, § 2525], the acceptance of a challenge to fight, and the voluntary engaging in a fight because of the challenge cannot be set up as a defense, for the defendant must show that he is without fault, and fighting under a challenge is unlawful and affords no justification. Lizana v. Lang, 90 Miss. 469, 43 So. 477, 1907 Miss. LEXIS 73 (Miss. 1907).

An instruction that no language however insulting will justify an assault and battery is properly refused. Barr v. State, 21 So. 131 (Miss. 1897).

3. Punitive damages.

Where only hands and feet are used in an assault and battery committed in response to an irresistible impulse and righteous resentment of a gratuitous insult, punitive damages are unwarranted. Holliman v. Lucas, 202 Miss. 463, 32 So. 2d 259, 1947 Miss. LEXIS 299 (Miss. 1947).

RESEARCH REFERENCES

ALR.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury, or death. 25 A.L.R.2d 1215.

Am. Jur.

6 Am. Jur. 2d, Assault and Battery §§ 67, 68 et seq.

CJS.

6A C.J.S., Assault and Battery §§ 18, 19 et seq.

§ 99-17-20. Capital murder or other crimes punishable by death.

No person shall be tried for capital murder, or any other crime punishable by death as provided by law, unless such offense was specifically cited in the indictment returned against the accused by setting forth the section and subsection number of the Code defining the offense alleged to have been committed by the accused. The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused. Any conviction of the accused for an offense punishable by death shall not be valid unless the offense for which the accused is convicted shall have been set forth in the indictment by section and subsection number of the Code which defined the offense allegedly committed by the accused.

HISTORY: Laws, 1974, ch. 576, § 6(3); Laws, 1977, ch. 458, § 10, eff from and after passage (approved April 13, 1977).

Cross References — Construction of the terms "capital case," "capital offense," "capital crime," and "capital murder," see § 1-3-4.

What constitutes the offense of capital murder, see § 97-3-19.

Indictment for murder and manslaughter, see § 99-7-37.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Lesser included offense instructions.

1. In general.

Defendant juvenile's indictment was not defective because the capital-murder statute was cited in the heading of the indictment but not the body of the indictment since the indictment listed the appropriate section and subsection in the heading and tracked the language of the statute in the body, and this section did not specify where the charged section and subsection number had to appear in the indictment. Hye v. State, 162 So. 3d 818, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 162 So. 3d 750, 2015 Miss. LEXIS 69 (Miss. 2015).

Indictment for robbery was appropriate because defendant's due process rights were not violated as the indictment was not required to have specified the items alleged to have been taken in the robbery. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Court rejected defendant's argument that his death sentence has to be vacated because the indictment failed to include a statutory aggravating factor or the mens rea standard required for capital murder. When defendant was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required. Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009), cert. denied, 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251 (U.S. 2010).

Underlying felony that elevated defendant's crime to capital murder was identified in the indictment along with the section and subsection of the statute under which he was being charged; as such, it sufficiently informed him of the charges against him and was sufficient under Mississippi law. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

For purposes of this section, "capital murder" does not include deliberate design murder. Campbell v. State, 749 So. 2d 1208, 1999 Miss. App. LEXIS 562 (Miss. Ct. App. 1999).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. Butler v. State, 608 So. 2d 314, 1992 Miss. LEXIS 588 (Miss. 1992).

A capital murder indictment alleging that the murder was committed while the defendant was "engaged in the commission of the crime of robbery . . . " gave the defendant sufficient notice of the nature and cause of the charges against him, even though the indictment did not specify the overt acts constituting the crime of robbery, where the indictment further read "contrary to and in violation of § 97-3-19(2)(e)," which is the statutory provision for capital murder, so that the indictment was in compliance with § 99-17-20. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

The indictment in a murder prosecution was not defective for failure to adequately describe and define the offenses charged where the statutory language used in the indictment adequately defined the offense so as to give the defendant fair notice of the crime charged in clear and intelligible language. Bell v. State, 360 So. 2d 1206, 1978 Miss. LEXIS 2318 (Miss. 1978).

The statutory requirement that a crime punishable by death be specifically cited in the indictment was substantially complied with in a rape prosecution, even though the indictment failed to include the words "as amended," after referring to the section and subsection of the rape statute. Rhymes v. State, 356 So. 2d 1165, 1978 Miss. LEXIS 2470 (Miss. 1978).

Trial court in prosecution for capital murder committed during armed robbery properly refused to quash indictment, which failed to cite section and subsection of code defining offense as required by this section, where indictment was amended prior to trial so as to cite applicable statutory offense involved. Bell v. State, 353 So. 2d 1141, 1977 Miss. LEXIS 2024 (Miss. 1977).

Defendant's indictment for murder was sufficient despite its failure to appraise him of whether he was charged under the capital murder section of the homicide statute [§ 97-3-19(2)] or under the section pertaining to murder [§ 97-3-19(1)], since, in light of the requirement of this section that one can only be tried for capital murder if such offense was specifically cited in the indictment, defendant could only have been charged with and convicted of murder, and since § 99-7-37, concerning requirements for indictments for homicide, does not require that the defendant be specifically appraised of whether he is being charged with murder or capital murder. Varnado v. State, 338 So. 2d 1239, 1976 Miss. LEXIS 1657 (Miss. 1976).

2. Lesser included offense instructions.

In defendant's capital murder case, a trial court correctly rejected a lesser included murder jury instruction because there was too much probative evidence in the record of the underlying felony of robbery for a reasonable juror to find defendant guilty of simple murder beyond a reasonable doubt. There was evidence that he stole a sword because he was in possession of it after the victim's death, it had the victim's blood on it, and there was evidence that defendant not only stole the keys to the victim's truck, but also the truck. Spicer v. State, 921 So. 2d 292, 2006 Miss. LEXIS 20 (Miss.), cert. denied, 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022 (U.S. 2006).

§ 99-17-21. Bribery; certain proof not necessary.

Upon the trial of an indictment for bribery, it shall not be necessary to prove the conviction of any offender, for the offense in relation to which any agreement or understanding, prohibited by sections appearing in Title 97, Mississippi Code of 1972, dealing with bribery, shall have been made.

HISTORY: Codes, 1857, ch. 64, art. 42; 1871, § 2519; 1880, § 2735; 1892, § 1429; 1906, § 1502; Hemingway's 1917, § 1260; 1930, § 1283; 1942, § 2526.

Cross References — Bribery offenses in connection with medicaid benefits, see

§ 43-13-207.

Bribery of meat inspection officers, see § 75-35-29.

Bribery and influence of legislative power, see §§ 97-7-53 et seq.

Criminal offenses of bribery affecting administration of justice, see §§ 97-9-5 through 97-9-10.

Criminal offenses of bribery involving public or private officers, agents or trustees, see §§ 97-11-11, 97-11-13.

RESEARCH REFERENCES

ALR.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe. 20 A.L.R.2d 1012.

Am. Jur.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

§ 99-17-23. Dueling; offender compelled to testify against another.

If any person offend against any of the provisions of Sections 97-39-1 to 97-39-11, Mississippi Code of 1972, headed Dueling, such person shall be a competent witness against any other person offending in the same transaction, and may be compelled to appear and give evidence in the same manner as other witnesses; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying, except for perjury in giving such testimony; and the fact that he testified thereof shall be a bar to any prosecution against him for such transaction.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 9(6); 1857, ch. 64, art. 55; 1871, § 2535; 1880, § 2751; 1892, § 1430; 1906, § 1503; Hemingway's 1917, § 1261; 1930, § 1284; 1942, § 2527.

RESEARCH REFERENCES

ALR.

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 A.L.R.4th 990.

Lawyers' Edition.

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

§ 99-17-25. Gambling and futures contracts; state not confined to proof of single violation.

On the trial of all indictments for gambling or gaming or operating a bucket-shop or dealing in contracts commonly called "futures," the state shall not be confined in the proof to a single violation, but under the indictment charging a single offense may give in evidence any one or more offenses of the same character committed anterior to the day laid in the indictment and not barred by the statute of limitations; but in such case, after conviction or acquittal on the merits, the accused shall not be again liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment.

HISTORY: Codes, 1857, ch. 64, § 33, art. 148; 1871, § 2611; 1880, § 2857; 1892, § 1431; 1906, § 1504; Hemingway's 1917, § 1262; 1930, § 1285; 1942, § 2528.

Cross References — Gambling and futures contracts generally, see §§ 87-1-1 et seq.

Criminal offenses of gambling and lotteries generally, see §§ 97-33-1 et seq.

JUDICIAL DECISIONS

1. In general.

In prosecution of seven defendants for being interested in gambling table, evidence as to gaming on occasions subsequent to first occasion admitted when all defendants but one participated in furtherance of game held not admissible, where evidence as to subsequent occasions disclosed separate offenses in commission of which some of the defendants did not participate. Boyd v. State, 177 Miss. 34, 170 So. 671, 1936 Miss. LEXIS 247 (Miss. 1936).

This section [Code 1942, § 2528] does not aid an indictment for gaming charging a number of defendants with individual offenses or authorize the conviction of a number of persons indicted jointly for gambling upon proof of individual offenses committed by them separately. Howard v. State, 83 Miss. 378, 35 So. 653, 1903 Miss. LEXIS 56 (Miss. 1903).

Under the statute a conviction for the particular offense charged does not confer immunity for similar offenses committed prior to the time laid in the indictment unless evidence thereof were adduced on the trial. Pope v. State, 63 Miss. 53, 1885 Miss. LEXIS 12 (Miss. 1885).

RESEARCH REFERENCES

Am. Jur.

38 Am. Jur. 2d, Gambling §§ 180 et seq.

CJS.

38 C.J.S., Gaming §§ 131 et seq.

§ 99-17-27. Gambling and futures contracts; witness compelled to testify; immunity granted; penalty for refusing.

No person shall be excused from attending and testifying before a grand jury, or before any court, or in any cause or proceeding, criminal or otherwise based upon or growing out of any alleged violation of the provisions of law as to gambling or gaming, or as to operating a bucket-shop, or the dealing in contracts commonly called "futures," of which he shall have knowledge, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before the grand jury or any court; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 11(6); 1857, ch. 64, art. 150; 1871, § 2613; 1880, § 2860; 1892, § 1432; 1906, § 1505; Hemingway's 1917, § 1263; 1930, § 1286; 1942, § 2529; Laws, 1912, ch. 261.

Cross References — Gambling and futures contracts generally, see §§ 87-1-1 et seq.

Criminal offenses of gambling and lotteries generally, see §§ 97-33-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Where trial court quashed an indictment against defendants on the ground that they had testified before the grand jury under such circumstances as to render their action in so doing not altogether voluntary, the supreme court in affirming the judgment in that the defendants were immune from prosecution under the indictment returned by that grand jury, did not hold that the defendants would be immune from prosecution under indictment by some other grand jury before whom they may not appear as witnesses to testify. State v. Milam, 210 Miss. 13, 49 So. 2d 806, 1951 Miss. LEXIS 264 (Miss. 1951).

This section [Code 1942, § 2529] was enacted with the idea that a grant of complete immunity was necessary to the compelling of a person to testify or to produce his books, papers and effects, which might have a tendency to incriminate him, or to furnish a link in a chain of evidence that would establish a crime on his part. State v. Bates, 187 Miss. 172, 192 So. 832, 1940 Miss. LEXIS 209 (Miss. 1940).

This statute is remedial in its nature and should be liberally construed in the giving of complete immunity from prosecution to a person whose constitutional rights may be affected. State v. Bates, 187 Miss. 172, 192 So. 832, 1940 Miss. LEXIS 209 (Miss. 1940).

The grand jury had no power to indict a defendant for a crime established by defendant's books, papers and effects obtained under a writ of duces tecum. State v. Bates, 187 Miss. 172, 192 So. 832, 1940 Miss. LEXIS 209 (Miss. 1940).

The immunity from prosecution because of production of one's books and papers was not affected by the fact that the subpoena duces tecum to secure such documentary matter was issued and served upon his secretary. State v. Bates, 187 Miss. 172, 192 So. 832, 1940 Miss. LEXIS 209 (Miss. 1940).

The court will not examine the proceedings of the grand jury merely to see whether they acted on competent evidence, or whether it was legal, or in regard to the relevancy or legality of the testimony given before them, but, the court, on proper proceedings, may inquire into the legality of their action and afford to the party affected the necessary remedy to protect him against illegal acts. State v. Bates, 187 Miss. 172, 192 So. 832, 1940 Miss. LEXIS 209 (Miss. 1940).

It is error to refuse a defendant on trial on a charge of gambling an instruction relating to the right of a jury to consider in determining the interest of a witness the fact that the witness secured immunity by testifying for the state under the provisions of this section [Code 1942, § 2529]. Howard v. State, 83 Miss. 378, 35 So. 653, 1903 Miss. LEXIS 56 (Miss. 1903).

RESEARCH REFERENCES

ALR.

When is federal prosecutor bound by promises of immunity or plea bargains made by another federal agent. 55 A.L.R. Fed. 402.

Lawyers' Edition.

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

§ 99-17-29. Lotteries; purchaser of ticket compelled to testify against seller.

The purchaser of any lottery ticket, or device in the nature of a lottery ticket, shall be a competent witness against the person from whom the same was purchased, and may be compelled to testify, but shall thereby be exempted from prosecution for buying or having the same.

HISTORY: Codes, 1871, § 2735; 1880, § 2979; 1892, § 1434; 1906, § 1507; Hemingway's 1917, § 1265; 1930, § 1288; 1942, § 2531.

Cross References — Criminal offenses of gambling and lotteries generally, see §§ 97-33-1 et seq.

RESEARCH REFERENCES

ALR.

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others. 32 A.L.R.4th 990.

Lawyers' Edition.

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

§ 99-17-31. Offenses affecting legislature; witness denied privilege against self-incrimination.

Upon the trial of a person charged with any of the crimes named and defined in Sections 97-7-45 through 97-7-57, Mississippi Code of 1972, relating to offenses affecting the legislature, a person otherwise competent as a witness shall not be excused from testifying as such concerning the offense charged on the ground that such testimony might criminate him or subject him to public infamy; but such testimony shall not afterward be used against him in any criminal prosecution, except for perjury in giving such testimony, nor shall the punishment of any person for the acts which constitute a violation of either of the said sections by the legislature, or either house thereof, as for a contempt, bar or preclude prosecutions thereunder.

HISTORY: Codes, 1892, § 1433; 1906, § 1506; Hemingway's 1917, § 1264; 1930, § 1287; 1942, § 2530; Laws, 1912, ch. 261.

Cross References — Witnesses before the Legislature not liable to prosecution in certain cases, see § 5-1-25.

RESEARCH REFERENCES

Lawyers' Edition.

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

§ 99-17-33. Perjury; no variance between "sworn" and "affirmed."

In prosecutions for perjury, where the indictment charges that the defendant was duly sworn at the time he is averred to have testified falsely, it shall not be a variance if the proof show he was affirmed, and vice versa.

HISTORY: Codes, 1857, ch. 64, art. 204; 1871, § 776; 1880, § 1605; 1892, § 1437; 1906, § 1510; Hemingway's 1917, § 1268; 1930, § 1291; 1942, § 2534.

Cross References — Term "oath" as including word "affirmation," see § 1-3-35.

A definition of term "sworn," see § 1-3-53.

Criminal offense of perjury, see §§ 97-9-59 et seq.

§ 99-17-35. Instructions to jury.

The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused," as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1(144); 1857, ch. 61, art. 161; 1871, § 643; 1880, § 1714; 1892, § 732; 1906, § 793; Hemingway's 1917, § 577; 1930, § 586; 1942, § 1530.

Cross References — Judge not to sum up or comment or charge jury, see § 11-7-155.

Statutory jury instructions in capital cases, see § 99-19-103.

Jury instructions, see Miss. Unif. Cir. & County Ct. Prac. R. 3.07.

Time requirements for filing requested instructions and specific objections to instructions, and instructions in circuit courts generally, see Miss. Unif. Cir. & County Ct. Prac. R. 3.07.

Jury taking the instructions into the jury room, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

JUDICIAL DECISIONS

ANALYSIS

1. Power of court in general.
2. Testimony of judge.
3. Requested instructions in general.
4. Oral instructions.
5. Time for instructions.
6. Construction of instructions as a whole.
7. Applicability and responsiveness to evidence.
8. —Murder or homicide cases.
9. Applicability to issues.
10. Assumption of facts.
11. Conflicting and inconsistent instructions.
12. Invasion of province of jury.
13. Comment on evidence.
14. Weight of evidence.
15. Undue prominence to particular matters.
16. Instructions as to more than one theory.
17. Peremptory instruction.
18. Modification of withdrawal.
19. Cure of error.
20. Subject matter of instructions.
21. —Definition and description of crime; murder or homicide cases.
22. — —Other cases.
23. —Lesser crimes.
24. —Credibility of witnesses, generally.
25. —Credibility of prosecuting witness.
26. —Credibility of accused.
27. —Credibility of accomplice.
28. —Circumstantial evidence.
29. —Reasonable doubt; murder or homicide cases.
30. — —Other cases.
31. —Self-defense, generally.
32. —In murder or homicide cases.
33. — —In other cases.
34. —Defense of another.
35. —Burden of proof.
36. —Presumptions, generally.
37. —Presumption of innocence.
38. —Dying declaration.
39. —Punishment.
40. —Miscellaneous.
41. — —Homicide cases.
42. — —Assault cases.
43. — —Larceny, robbery, burglary, or stolen property cases.
44. — —Other cases.
45. Review.

1. Power of court in general.

Trial court did not err in providing the jury with individual jury instructions that were marked with the word “given” written on them and a designation indicating whether the particular instruction was submitted by the State, the court, or the defense. Berry v. State, 179 So. 3d 84, 2015 Miss. App. LEXIS 600 (Miss. Ct. App. 2015).

Voluntary intoxication instruction given by the trial court did not cancel out or confuse the jury on defendant’s own theory of self-defense in her trial for aggravated assault under Miss. Code Ann. § 97-3-7(2) because the case was not circumstantial evidence case and there was evidence presented of possible intoxication by defendant. Lawrence v. State, 3 So. 3d 754, 2008 Miss. App. LEXIS 406 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 101 (Miss. 2009).

Trial court had the authority under Miss. Unif. Cir. & County Ct. Prac. R. 3.10 to give the jury supplemental instructions, and the trial court did not err in giving the jury an additional instruction on voluntary intoxication as a defense or in rereading the murder and manslaughter instructions to the jury, nor did the court find any violation of Miss. Code Ann. § 99-17-35; the intoxication instruction was necessary in order to guide the jury in making an informed decision on defendant’s guilt, and the court found no harm emanating from the trial judge’s rereading of the murder and manslaughter instructions. Thornton v. State, 841 So. 2d 170, 2003 Miss. App. LEXIS 76 (Miss. Ct. App. 2003).

While the statute does say the clerk of the court should mark the instructions as given or refused, nothing in the statute prohibits the circuit judge, as the presiding authority at the trial, from so marking the instructions. Trull v. State, 811 So. 2d 243, 2000 Miss. App. LEXIS 430 (Miss. Ct. App. 2000).

Defendant is entitled to submit instructions that present her theory of the case to jury, while trial judge is entitled to refuse instructions that incorrectly state the law, are without foundation in evidence or are stated elsewhere in other instructions. Manuel v. State, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

The trial judge did not err in not reinstructing the jury after the judge sent the jury back to the jury room for further deliberations when it reported that it was unable to reach a verdict. Harrison v. State, 520 So. 2d 1352, 1987 Miss. LEXIS 2928 (Miss. 1987).

It is the duty of the trial judge to instruct the jury, and not the duty of the district attorney. Clemons v. State, 320 So. 2d 368, 1975 Miss. LEXIS 1489 (Miss. 1975).

This section contravenes the constitutional mandate imposed upon the judiciary for the fair administration of justice insofar as the phrase "at the request of either party" prohibits a judge from instructing a jury as to the applicable law of the case; this section shall be applied with the indicated unconstitutional phrase deleted; the trial judge may initiate and give appropriate written instructions in addition to the approved instructions submitted by the litigants if he deems the ends of justice so require, but the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so. Newell v. State, 308 So. 2d 71, 1975 Miss. LEXIS 1830 (Miss. 1975).

Although the trial court cannot give instructions on its own and is under no obligation to modify or correct a defective instruction, it must refuse instructions which do not correctly state the principles of law applicable to the facts in a particular case. Jolly v. State, 269 So. 2d 650, 1972 Miss. LEXIS 1232 (Miss. 1972).

A trial judge may withdraw a previously granted instruction during closing arguments. Deaton v. State, 242 So. 2d 452, 1970 Miss. LEXIS 1385 (Miss. 1970).

However, if the trial judge were to interpose an objection to evidence on behalf of the defendant in criminal cases, he would often severely interfere with the defendant's counsel in his effort to develop trial strategy and would possibly do the defendant more harm than good. Mixon v. Black, 198 So. 2d 213, 1967 Miss. LEXIS 1247 (Miss. 1967).

The circuit judge cannot originate instructions or give them on his own motion. Gangloff v. State, 232 Miss. 395, 99 So. 2d 461, 1958 Miss. LEXIS 285 (Miss. 1958).

The mere fact that two instructions given for the state in a prosecution for burglary and larceny were not numbered did not render them void. Spiers v. State, 229 Miss. 663, 91 So. 2d 844, 1957 Miss. LEXIS 312 (Miss. 1957).

The presiding judge is the source from which the law touching the case is to be supplied and he cannot of his own motion give any instruction whatever. Those given must be in writing and at the request of the party. Bangs v. State, 61 Miss. 363, 1883 Miss. LEXIS 138 (Miss. 1883).

A circuit judge is denied the power of originating instructions not called for or rendered necessary by those required by counsel. Watkins v. State, 60 Miss. 323, 1882 Miss. LEXIS 55 (Miss. 1882).

2. Testimony of judge.

Under this section [Code 1942, § 1530], a trial judge in a criminal prosecution cannot testify as a witness upon the merits in direct contradiction of defendant's testimony. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

A trial judge may not testify as a witness upon the merits of the controversy, especially where the trial is by jury and there is only one judge presiding, the functions of judge and witness being incompatible. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

If a judge has notice that he will be called as a witness, he should arrange for someone to try the case, and if he has not sufficient notice to make such arrangement, then he should refuse to testify as a witness in the case. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

Failure to object in advance to the trial judge's testifying as a witness will not preclude appellate review of the propriety of such procedure where immediately thereafter counsel moved that the evidence be stricken and, if not, for a mistrial. Brashier v. State, 197 Miss. 237, 20 So. 2d 65, 1944 Miss. LEXIS 291 (Miss. 1944).

3. Requested instructions in general. Defendant failed to establish entrapment as a matter of law; the trial court did not err in not submitting this instruction, given that the trial court found that the facts did not support defendant's claim that law enforcement acted outrageously, plus the court had previously found no entrapment as a matter of law in situations where law enforcement provided the money to the confidential informant to make a purchase, and the court was not persuaded by defendant's claim that her situation was similar to a "reverse sale." Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Defendant's requested instruction regarding his theory of the case, which was that he did not participate in drug transaction but rather was used as decoy, was adequately covered by instructions precluding jury from finding defendant guilty unless it determined that defendant participated in the transaction, and thus, defendant was not entitled to requested instruction. Triplett v. State, 672 So. 2d 1184, 1996 Miss. LEXIS 77 (Miss. 1996).

Where instructions requested by defendant are in improper form and are the only ones embodying legally correct theory of defendant's defense, it is the duty of the trial court to see that instructions are placed in proper form for submission to jury. Manuel v. State, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

The failure of a trial court in a capital murder prosecution to grant the defendant an instruction embodying his theory of defense constituted reversible error where the defendant's testimony established an evidentiary predicate for the defenses contained in his requested instructions, and the proffered instructions were the only ones presenting his theories of defense; if the requested instructions were in improper form, it was the duty of the trial court to see that they were placed in proper form for jury submission. Hester v. State, 602 So. 2d 869, 1992 Miss. LEXIS 399 (Miss. 1992).

Where a party offers evidence sufficient that a rational jury might find for him or her on the particular issue, that party of right is entitled to have the court instruct the jury on that issue and through this means submit the issue to the jury for its decision. The instruction may be denied only if the trial court can find, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences that may be drawn from the evidence in favor of the accused, that no hypothetical reasonable jury could find the fact as the accused suggests. Where a party is entitled to have an issue submitted to the jury through a viable instruction from the court, and where the instruction is denied, the error is not cured by the fact that the lawyer is nevertheless allowed to argue the point. Anderson v. State, 571 So. 2d 961, 1990 Miss. LEXIS 717 (Miss. 1990).

A trial judge's decision to strike a portion of a jury instruction requested by the defendant was not erroneous, even though the deleted portion was a correct statement of the law, since the deleted portion merely clarified the portion which was granted, and trial judges are "not required" to grant repetitious instructions. Davis v. State, 568 So. 2d 277, 1990 Miss. LEXIS 581 (Miss. 1990).

When a defendant's requested instruction is a proper statement of the law and is the only instruction that presents his or her theory of the case, it should be granted. Murphy v. State, 566 So. 2d 1201, 1990 Miss. LEXIS 443 (Miss. 1990).

In a prosecution for possession of marijuana with intent to sell, the circuit court's acceptance of its own 2 proposed instructions and the 4 instructions proposed by the prosecution, and its refusal of 9 of the defendant's 10 requested instructions, did not constitute reversible error where the judge refused the defendant's proposed instructions because they were "repetitious" of those which had already been accepted. Hemphill v. State, 566 So. 2d 207, 1990 Miss. LEXIS 460 (Miss. 1990).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. McGowan v. State, 541 So. 2d 1027, 1989 Miss. LEXIS 180 (Miss. 1989).

The trial court, in a homicide prosecution, did not err in refusing defendant's instruction on the disparity in age, size and strength between the deceased and defendant, which was stated in terms of what the evidence showed rather than what the jury believed from the evidence. Brister v. State, 231 Miss. 722, 97 So. 2d 654, 1957 Miss. LEXIS 558 (Miss. 1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069, 1958 U.S. LEXIS 1072 (U.S. 1958).

Where a defendant's failure to secure an instruction on the disparity in age, size and strength between deceased and the defendant was brought about by his refusal to accept the trial court's suggested modification in the instruction, which was correct, the defendant could not complain on appeal. Brister v. State, 231 Miss. 722, 97 So. 2d 654, 1957 Miss. LEXIS 558 (Miss. 1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069, 1958 U.S. LEXIS 1072 (U.S. 1958).

A defendant, whose burglary conviction did not rest entirely upon circumstantial evidence, who had requested and received instructions which told the jury that in order to convict they needed only to believe defendant guilty beyond every reasonable doubt, could not complain that no instruction contained the necessary qualification that in order for his guilt to appear beyond every reasonable doubt the evidence had to exclude every reasonable hypothesis consistent with his innocence, where the trial court was not requested to give such an instruction. Poole v. State, 231 Miss. 1, 94 So. 2d 239, 1957 Miss. LEXIS 486 (Miss. 1957).

Refusal to grant instruction in murder prosecution is not prejudicial error when the only part of the requested instruction which had not been covered by others was statement that indictment in case is no evidence of guilt, and no miscarriage of justice resulted. Howze v. State, 43 So. 2d 191 (Miss. 1949).

Refusal to grant instructions requested by accused in criminal case is proper when requested instructions do not state correct principles of law applicable to case and requested instruction is merely cumulative, same principles of law having been given in other instructions. Price v. State, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

In prosecution for murder, refusal of court to grant accused requested instruction is not error when other instructions granted accused embrace everything that is valid in the instruction refused. May v. State, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

Accused in murder prosecution who has requested and been granted instruction limiting jury to verdict of guilty of murder or acquittal cannot complain of instruction given at request of state because it limited jury to murder or acquittal. May v. State, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

In murder prosecution, trial court has no duty to give any instructions not requested. Smith v. State, 205 Miss. 283, 38 So. 2d 725, 1949 Miss. LEXIS 431 (Miss. 1949).

Giving of instructions on behalf of state and refusal of instructions requested by defendant is not error when the jury is fully and correctly instructed as to applicable principles of law by which guilt or innocence of accused is to be determined. Bramlett v. State, 37 So. 2d 305 (Miss. 1948).

Failure to instruct the jury on the joint trial of two defendants as to the right to convict one and acquit the other is not error where such instruction is not requested. Davis v. State, 200 Miss. 514, 27 So. 2d 769, 1946 Miss. LEXIS 316 (Miss. 1946).

Court is not in error for failing to give instructions not requested by either party, and has no power to give instructions on its own initiative. Cosey v. State, 161 Miss. 747, 138 So. 344, 1931 Miss. LEXIS 311 (Miss. 1931).

All instructions to the jury must be given by the court on written request.

Canterberry v. State, 90 Miss. 279, 43 So. 678, 1907 Miss. LEXIS 88 (Miss. 1907); Harvey v. State, 95 Miss. 601, 49 So. 268, 1909 Miss. LEXIS 274 (Miss. 1909); Williams v. State, 95 Miss. 671, 49 So. 513, 1909 Miss. LEXIS 275 (Miss. 1909); James v. State, 106 Miss. 353, 63 So. 669, 1913 Miss. LEXIS 140 (Miss. 1913); Dixon v. State, 106 Miss. 697, 64 So. 468, 1914 Miss. LEXIS 8 (Miss. 1914); Simmons v. State, 106 Miss. 732, 64 So. 721, 1914 Miss. LEXIS 13 (Miss. 1914); Akroid v. State, 107 Miss. 51, 64 So. 936, 1914 Miss. LEXIS 46 (Miss. 1914); Matthews v. State, 108 Miss. 72, 66 So. 325, 1914 Miss. LEXIS 170 (Miss. 1914); Pringle v. State, 108 Miss. 802, 67 So. 455, 1914 Miss. LEXIS 278 (Miss. 1914); Davenport v. State, 121 Miss. 548, 83 So. 738, 1920 Miss. LEXIS 103 (Miss. 1920); McLeod v. State, 130 Miss. 83, 92 So. 828, 1922 Miss. LEXIS 199 (Miss. 1922); Hays v. State, 130 Miss. 381, 94 So. 212, 1922 Miss. LEXIS 208 (Miss. 1922); Stevenson v. State, 136 Miss. 22, 100 So. 525, 1924 Miss. LEXIS 104 (Miss. 1924); Allen v. State, 139 Miss. 605, 104 So. 353, 1925 Miss. LEXIS 170 (Miss. 1925); Dalton v. State, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925); Tatum v. State, 142 Miss. 110, 107 So. 418, 1926 Miss. LEXIS 79 (Miss. 1926), overruled, Grant v. State, 172 Miss. 309, 160 So. 600, 1935 Miss. LEXIS 158 (Miss. 1935).

It is not error to refuse an instruction the substance of which has already been given in another instruction. Schrader v. State, 84 Miss. 593, 36 So. 385, 1904 Miss. LEXIS 41 (Miss. 1904).

The court cannot give instructions not asked in writing. Johnson v. State, 78 Miss. 627, 29 So. 515, 1900 Miss. LEXIS 164 (Miss. 1900).

The court has no power to give instructions not asked. Edwards v. State, 47 Miss. 581, 1873 Miss. LEXIS 6 (Miss. 1873), limited, Jones v. State, 51 Miss. 718, 1875 Miss. LEXIS 98 (Miss. 1875).

4. Oral instructions.

Although trial courts should always apprise counsel for all parties of communications with jury, supreme court's determination of whether failure to do so amounted to reversible error turns on whether ex parte communication prejudiced defendant so as to deny him fundamentally fair trial. De La Beckwith v. State, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Trial court's response to jury question, without first informing defense counsel, which stated that jurors could look at each other's trial notes did not amount to abuse of discretion in murder prosecution; evidence was complex and consisted of testimony of many witnesses, and jurors were having trouble remembering testimony of some witnesses. De La Beckwith v. State, 707 So. 2d 547, 1997 Miss. LEXIS 749 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153, 1998 U.S. LEXIS 5751 (U.S. 1998).

Oral jury instructions are not to be allowed regardless of who agrees to the procedure, and an oral instruction will be treated by the Supreme Court on appeal as a nullity. Traylor v. State, 582 So. 2d 1003, 1991 Miss. LEXIS 361 (Miss. 1991).

Confusion and misunderstanding is likely to be engendered when a trial judge attempts to instruct a jury orally through a bailiff during deliberations. At the very least, a trial judge can reduce to writing all messages to be delivered to the jury and thereby prevent the bailiff from improperly conveying an oral message. Edlin v. State, 523 So. 2d 42, 1988 Miss. LEXIS 108 (Miss. 1988).

Statement by the trial court to the jury, after it had reported itself to be deadlocked, that it was possible for honest men and women to have a difference of opinion about the facts of the case but that they should seek to reconcile their differences, and that he was going to send them back to deliberate further was not in violation of this section [Code 1972, § 99-17-35]. Dixon v. State, 306 So. 2d 302, 1975 Miss. LEXIS 1801 (Miss. 1975).

Where the prosecutor, in argument to the jury made a statement which was objected to and which the judge instructed jury to disregard, and the prosecutor subsequently, after conferring with the judge in jury's presence, informed jury that what he was going to say was permitted by the judge, and then repeated substantially the same originally objectionable statement, and the judge then denied objection to the latter statement, the effect was that of permitting counsel to give an oral instruction for the judge, and was a violation of this section [Code 1942, § 1530]. Pearson v. State, 254 Miss. 275, 179 So. 2d 792, 1965 Miss. LEXIS 947 (Miss. 1965).

Although the action of the trial judge in calling the attention of the jury to any particular instruction is not to be condoned, it was not prejudicial error for him to read to the jury instructions previously granted the state and the defendant solely with respect to the form of the verdict. King v. State, 251 Miss. 161, 168 So. 2d 637, 1964 Miss. LEXIS 337 (Miss. 1964).

Remark of trial court, in ruling on right of prosecution to cross-examine accused in murder case concerning insurance on victim, that matter of insurance was wholly immaterial and that nothing about insurance was to be considered in any way derogatory to defendant, or derogatory to anybody else, is not equivalent to oral instruction to jury upon law of case contrary to express provisions of this section [Code 1942, § 1530], requiring all jury instructions upon the law to be in writing, and is not prejudicial to defendant. Price v. State, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

Where in murder prosecution neither state nor defense requested manslaughter instruction, trial judge's statement, made in response to juror's statement that verdict might be reached if sentence lighter than life could be imposed, that supreme court had held that jury might render verdict of manslaughter held reversible error. Westbrook v. State, 174 Miss. 52, 163 So. 838, 1935 Miss. LEXIS 47 (Miss. 1935).

It is reversible error for the court of its own motion to give the jury an oral instruction, although in response to questions asked by one of the jurors. Gilbert v. State, 78 Miss. 300, 29 So. 477, 1900 Miss. LEXIS 162 (Miss. 1900).

5. Time for instructions.

There is no error in criminal prosecution in the granting of proper instructions, either during or after the close of the argument of case, unless instructions are granted secretly. Goss v. State, 205 Miss. 177, 38 So. 2d 700, 1949 Miss. LEXIS 424 (Miss. 1949).

While the court may grant an instruction at any time before the jury retires, it should not do so after argument has commenced, except on rare and emergent occasions, and with opportunity to the other party to prepare and request counter charges. Montgomery v. State, 85 Miss. 330, 37 So. 835, 1904 Miss. LEXIS 158 (Miss. 1904), overruled, Flowers v. State, 101 Miss. 108, 57 So. 226, 1911 Miss. LEXIS 94 (Miss. 1911).

The proper time for the granting of an instruction is after the close of the evidence and before the argument of the case. Montgomery v. State, 85 Miss. 330, 37 So. 835, 1904 Miss. LEXIS 158 (Miss. 1904), overruled, Flowers v. State, 101 Miss. 108, 57 So. 226, 1911 Miss. LEXIS 94 (Miss. 1911).

The procuring of an instruction in a criminal case from the court during the argument for defendant, whose counsel had no notice thereof until it was produced for the first time during the closing argument for the state, is error, although on objection the state's attorney offered to permit defendant's counsel then to answer it. Montgomery v. State, 85 Miss. 330, 37 So. 835, 1904 Miss. LEXIS 158 (Miss. 1904), overruled, Flowers v. State, 101 Miss. 108, 57 So. 226, 1911 Miss. LEXIS 94 (Miss. 1911).

6. Construction of instructions as a whole.

Jury instruction may be improper if it incorrectly states law, is without foundation in evidence, or is stated elsewhere in instruction; however, jury instructions are to be read as whole and no one instruction is to be taken out of context of whole. Williams v. State, 667 So. 2d 15, 1996 Miss. LEXIS 3 (Miss. 1996), overruled in part, Smith v. State, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

Court's jury instructions will not warrant reversal if jury was fully and fairly instructed by other instructions. Williams v. State, 667 So. 2d 15, 1996 Miss. LEXIS 3 (Miss. 1996), overruled in part, Smith v.

State, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

In an aggravated assault prosecution defended on M'Naghten insanity grounds, the giving of an instruction that voluntary intoxication was no defense could not have caused the jury to disregard defendant's insanity defense, where all of the instructions, when read together, clearly instructed the jury as to the state's burden in proving all elements of the crime and in proving defendant's sanity. Norris v. State, 490 So. 2d 839, 1986 Miss. LEXIS 2477 (Miss. 1986).

The trial court did not commit reversible error in failing to grant the defendant a change of venue where the defendant offered no sworn evidence to support his motion and there was nothing in the record to show that the trial judge abused his discretion. Butler v. State, 320 So. 2d 786, 1975 Miss. LEXIS 1502 (Miss. 1975), but see Douglas v. State, 525 So. 2d 1312, 1988 Miss. LEXIS 216 (Miss. 1988).

In a murder prosecution, while the insanity instructions given were defective in that, although including the right and wrong test, they omitted reference to the defendant's ability to understand and appreciate the nature of his act, the defect did not constitute reversible error, where there were other instructions given which stated the correct rule. Smith v. State, 220 So. 2d 313, 1969 Miss. LEXIS 1453 (Miss. 1969).

While, in a prosecution for manslaughter arising out of an automobile accident, the trial court might properly have granted an instruction announcing the rule of reasonable doubt and informing the jurors that each and every one must believe defendant guilty beyond a reasonable doubt before he should vote to convict, it was not error to refuse to so instruct where other instructions announced the same rules of applicable law and prescribed the duties of the jurors. Smith v. State, 233 Miss. 886, 103 So. 2d 360, 1958 Miss. LEXIS 453 (Miss. 1958).

Where an instruction granted to one accused of burglary and larceny, embodied the same rules and legal principles and requirements for guilt as contained in an instruction requested by the accused, the court did not err in refusing the requested instruction. Spiers v. State, 229 Miss. 663, 91 So. 2d 844, 1957 Miss. LEXIS 312 (Miss. 1957).

Instruction which, when standing alone, would be erroneous, is harmless when point of instruction is fully covered by other correct instructions granted both sides at trial. Bone v. State, 207 Miss. 868, 43 So. 2d 571, 1949 Miss. LEXIS 398 (Miss. 1949).

All instructions given in murder prosecution, both for state and for defendant, must be construed as one instruction and possibility of there being an unwarranted assumption by jury that defendant inflicted fatal blows by reason of instruction for state is eliminated when instructions granted defendant clearly require that jury believe beyond every reasonable doubt that defendant did inflict blows before they could find her guilty as charged. Dickins v. State, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Instructions in murder prosecution are all to be read together, unless in conflict, and if, when read together, instructions give jury law in case fully and fairly for state and defense, in accordance with requests, judgment on verdict of jury on conflicting testimony will not be reversed unless it affirmatively appear, from the whole record, that such judgment has resulted in miscarriage of justice. Howze v. State, 43 So. 2d 191 (Miss. 1949).

An erroneous instruction is not fatal if supplemented by an instruction supplying the missing element. Pettus v. State, 200 Miss. 397, 27 So. 2d 536, 1946 Miss. LEXIS 302 (Miss. 1946).

The instructions must be taken as a whole, as one body, and announce, not the law for the plaintiff or the defendant, but the law of the case. Holmes v. State, 192 Miss. 54, 4 So. 2d 540, 1941 Miss. LEXIS 12 (Miss. 1941).

An improper or erroneous definition of a crime though contradictory to a correct definition in another instruction would be reversible error. McCoy v. State, 91 Miss. 257, 44 So. 814, 1907 Miss. LEXIS 147 (Miss. 1907); Moore v. State, 91 Miss. 250, 44 So. 817, 1907 Miss. LEXIS 148 (Miss. 1907); Sullivan v. State, 92 Miss. 828, 46 So. 248, 1908 Miss. LEXIS 224 (Miss.

1908); Lewis v. State, 93 Miss. 697, 47 So. 467, 1908 Miss. LEXIS 146 (Miss. 1908), overruled, Anderson v. State, 97 Miss. 658, 53 So. 393, 1910 Miss. LEXIS 294 (Miss. 1910); Brett v. State, 94 Miss. 669, 47 So. 781, 1909 Miss. LEXIS 327 (Miss. 1909); Williams v. State, 95 Miss. 671, 49 So. 513, 1909 Miss. LEXIS 275 (Miss. 1909); Anglin v. State, 96 Miss. 215, 50 So. 492, 1909 Miss. LEXIS 72 (Miss. 1909); Waldrop v. State, 98 Miss. 567, 54 So. 66, 1910 Miss. LEXIS 95 (Miss. 1910); Long v. State, 103 Miss. 698, 60 So. 730, 1912 Miss. LEXIS 217 (Miss. 1912); Matthews v. State, 108 Miss. 72, 66 So. 325, 1914 Miss. LEXIS 170 (Miss. 1914); Reynolds v. State, 136 Miss. 329, 101 So. 485, 1924 Miss. LEXIS 140 (Miss. 1924); Woulard v. State, 137 Miss. 808, 102 So. 781, 1925 Miss. LEXIS 23 (Miss. 1925); Pickett v. State, 140 Miss. 671, 106 So. 95, 1925 Miss. LEXIS 303 (Miss. 1925); Frazier v. State, 141 Miss. 18, 106 So. 443, 1925 Miss. LEXIS 227 (Miss. 1925); Stubblefield v. State, 142 Miss. 787, 107 So. 663, 1926 Miss. LEXIS 104 (Miss. 1926); Norris v. State, 143 Miss. 365, 108 So. 809, 1926 Miss. LEXIS 273 (Miss. 1926).

Instruction for plaintiff and defendant should be construed together as an entirety. If an instruction is not in itself prejudicial to the opposite party although erroneous when considered by itself it will not be reversible error. Murphy v. State, 89 Miss. 827, 42 So. 877, 1906 Miss. LEXIS 93 (Miss. 1906).

7. Applicability and responsiveness to evidence.

In a prosecution for grand larceny based on the taking of $750 from a cash drawer in a bank, the trial court did not err in denying the defendant's request for a jury instruction regarding the lesser included offense of petit larceny, even though no witness could testify to actually seeing more than $100 being taken. Ford v. State, 555 So. 2d 691, 1989 Miss. LEXIS 512 (Miss. 1989).

Aiding and abetting instruction, based on Model Jury Instruction, was inappropriate where it was not founded upon evidence elicited at trial; case was built entirely on circumstantial evidence, with two defendants being found together in car with stolen merchandise and close to burglary both in time and place; no evidence indicated either man was not an actual participant in burglary, and there was no evidence that either of defendants aided or abetted other; additionally, wording of instruction was awkward and misleading in that it appeared to state that if jury determined defendants in fact committed burglary, only one would be found guilty and another portion of instruction seemed to infer that neither defendant needed to be present at burglary to be found guilty. Brazile v. State, 514 So. 2d 325, 1987 Miss. LEXIS 2709 (Miss. 1987).

In a grand larceny prosecution based upon the taking of an automobile from a used car lot, an instruction as to the necessity of an attempt to convert the property to the taker's own use was properly refused where there was nothing in the record on which to base the contention that the defendant took the automobile in the presence of other persons with the intent to return it or to buy it. Lewis v. State, 248 So. 2d 805, 1971 Miss. LEXIS 1493 (Miss. 1971).

An instruction that if they believed that the accused and the county school superintendent were guilty of embezzling school funds, the jury might find the accused guilty regardless of whether he received any or all the money, was prejudicially erroneous, where there was no evidence upon which it could have been predicated. O'Harrell v. State, 97 So. 2d 517 (Miss. 1957).

Even if an instruction to the effect that if the jury should find that the accused was intoxicated at the time of the difficulty it must be satisfied beyond a reasonable doubt that such intoxication did not incapacitate him from forming a deliberate design to kill the victim should be given where the evidence justifies it, it was properly refused where the accused's testimony established that he was not drunk at the time of committing an assault and battery with intent to kill. Wixon v. State, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

The court properly refused the accused's tendered instruction that if the property allegedly stolen was shown to have been taken openly and in the presence of third persons, it would be only evidence of trespass, where there was no evidence that the property was taken openly in the presence of other persons. Crouse v. State, 229 Miss. 15, 89 So. 2d 919, 1956 Miss. LEXIS 581 (Miss. 1956).

A case in which the court properly instructed the jury that they "may" return one of three named verdicts. Tatum v. State, 142 Miss. 110, 107 So. 418, 1926 Miss. LEXIS 79 (Miss. 1926), overruled, Grant v. State, 172 Miss. 309, 160 So. 600, 1935 Miss. LEXIS 158 (Miss. 1935).

It is error to give an instruction in the absence of evidence on the point. Johnson v. State, 124 Miss. 429, 86 So. 863, 1920 Miss. LEXIS 526 (Miss. 1920).

An instruction which authorizes the jury to convict the defendant for lack of evidence is erroneous. Benson v. State, 102 Miss. 16, 58 So. 833, 1912 Miss. LEXIS 35 (Miss. 1912).

Only instructions applicable to the evidence in the case should be given. Canterberry v. State, 90 Miss. 279, 43 So. 678, 1907 Miss. LEXIS 88 (Miss. 1907); Williams v. State, 90 Miss. 319, 43 So. 467, 1907 Miss. LEXIS 64 (Miss. 1907); Prince v. State, 93 Miss. 263, 46 So. 537, 1908 Miss. LEXIS 93 (Miss. 1908).

A case where an instruction for defendant was properly refused on the charge of burglary and larceny. Dees v. State, 89 Miss. 754, 42 So. 605, 1906 Miss. LEXIS 61 (Miss. 1906).

An instruction for the state is fatally erroneous if it ignores and removes from consideration of the jury a valid defense supported by evidence. Suttle v. State, 88 Miss. 177, 40 So. 552, 1906 Miss. LEXIS 120 (Miss. 1906).

Where in a murder case the defense is not predicated on self-defense it is erroneous to give an instruction to the effect that self-defense can only be availed of under certain circumstances, of which there was no evidence. Sullivan v. State, 85 Miss. 149, 37 So. 1006, 1904 Miss. LEXIS 168 (Miss. 1904).

An instruction not based on evidence is fatally erroneous if by any means it might mislead the jury. Cooper v. State, 80 Miss. 175, 31 So. 579, 1902 Miss. LEXIS 230 (Miss. 1902).

However the supreme court has announced the opposite doctrine in the following cases: Virgil v. State, 63 Miss. 317, 1885 Miss. LEXIS 68 (Miss. 1885), overruled, Taylor v. State, 148 Miss. 713, 114 So. 823, 1927 Miss. LEXIS 89 (Miss. 1927); Parker v. State, 102 Miss. 113, 58 So. 978, 1912 Miss. LEXIS 37 (Miss. 1912), overruled, Houston v. State, 105 Miss. 413, 62 So. 421, 1913 Miss. LEXIS 225 (Miss. 1913) (ovrld by Houston v. State (1913) 105 Miss. 413, 62 So. 421); Rester v. State, 110 Miss. 689, 70 So. 881, 1916 Miss. LEXIS 191 (Miss. 1916), overruled, Calicoat v. State, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922).

8. —Murder or homicide cases.

A murder defendant's statement that he had gone crazy and could not stop, that the victim would not stop "messing" with him, without explaining how the victim was "messing" with him, did not indicate that the defendant acted in lawful self-defense or that the victim committed an outrageous act justifiably provoking the defendant into a rage, so as to entitle the defendant to a manslaughter instruction. Nicolaou v. State, 534 So. 2d 168, 1988 Miss. LEXIS 524 (Miss. 1988).

No error was committed in refusing defendants instructions in homicide prosecution that if the jury believed that the defendant, at the time he shot the victim, was suffering from mental disease, and that this condition of mind was sufficient to break down in defendant's mind, at the time of the shooting, the distinction between right and wrong, it was immaterial whether he was totally or only partially insane on other subjects, since there was no evidence to indicate that the defendant was partially insane on one subject and not insane on other subjects. Herron v. State, 287 So. 2d 759, 1974 Miss. LEXIS 1832 (Miss.), cert. denied, 417 U.S. 972, 94 S. Ct. 3179, 41 L. Ed. 2d 1144, 1974 U.S. LEXIS 2110 (U.S. 1974).

In a homicide prosecution, the granting of an instruction stating abstract principles of law relative to the guilt of a person consenting to and encouraging the commission of a crime, was error. Kidd v. State, 258 So. 2d 423, 1972 Miss. LEXIS 1500 (Miss. 1972).

In a prosecution for the slaying of the manager of a service station, it was not error to present an instruction defining the collateral offenses of robbery and attempted robbery, where witnesses testified that the defendant made the statement that he was going to get some money, that he exhibited his pistol to them before the attempted robbery and killing, that money was found on the driveway of the service station after the shooting, and that the drawer of the cash register was open. McNeal v. State, 231 So. 2d 491, 1970 Miss. LEXIS 1591 (Miss. 1970).

Where the evidence is sufficient to convict for murder, the defendant, if convicted of manslaughter, cannot complain of the granting of a manslaughter instruction. Dover v. State, 227 So. 2d 296, 1969 Miss. LEXIS 1346 (Miss. 1969).

Where the victim of a homicide was a larger man than the defendant charged with the shooting, but at the time of the shooting the defendant was some distance from the victim and behind a counter, while the victim was at the door of the building and there was no chance for the victim to use his superior strength upon the defendant from such position, a jury instruction referring to the difference in size of the defendant and the victim, applicable to the question whether the defendant had reasonable ground to believe he was in danger, was properly refused. Corbin v. State, 220 So. 2d 299, 1969 Miss. LEXIS 1450 (Miss. 1969), overruled, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

One convicted of manslaughter may not complain of giving of a murder instruction. Pickert v. State, 234 Miss. 513, 106 So. 2d 681, 1958 Miss. LEXIS 525 (Miss. 1958).

In a prosecution under an indictment charging accused, jointly with two others, with murder, accused's tendered instruction that since he was charged with the killing of the deceased with malice aforethought by the use of a certain gun, unless the state had proved the charge beyond all reasonable doubt, the jury should find the defendant not guilty, was properly refused, where it was not supported by the evidence and was contrary to the provisions of Code 1942, § 1995. West v. State, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

Where the evidence is sufficient to convict for murder, the defendant cannot complain of the granting of a manslaughter instruction, if he has been convicted of manslaughter. Woods v. State, 229 Miss. 563, 91 So. 2d 273, 1956 Miss. LEXIS 640 (Miss. 1956).

Refusal to grant defendant's requested instruction authorizing jury to find defendant guilty of simple assault and battery was proper where proof showed that defendant was either guilty of assault and battery with intent to kill and murder or nothing. Duckworth v. State, 209 Miss. 318, 46 So. 2d 787, 1950 Miss. LEXIS 390 (Miss. 1950).

In prosecution for murder, conventional instruction as to verdicts and punishments upon conviction of murder, which does not contain instruction on manslaughter, is not improper on ground that it limits jury to murder or acquittal, when there is no evidence suggesting manslaughter. May v. State, 205 Miss. 295, 38 So. 2d 726, 1949 Miss. LEXIS 432 (Miss. 1949).

While a manslaughter instruction should not be given in a case of murder or complete justification, such instruction is not reversible error. Vassar v. State, 200 Miss. 412, 27 So. 2d 541, 1946 Miss. LEXIS 303 (Miss. 1946).

A case in which the evidence showed defendant guilty of either murder or nothing and in which manslaughter instruction was given is held not erroneous. White v. State, 142 Miss. 484, 107 So. 755, 1926 Miss. LEXIS 113 (Miss. 1926); Fleming v. State, 142 Miss. 872, 108 So. 143, 1926 Miss. LEXIS 134 (Miss. 1926).

A case in which it is held harmless error to give a manslaughter instruction. Stevenson v. State, 136 Miss. 22, 100 So. 525, 1924 Miss. LEXIS 104 (Miss. 1924).

An instance where it was harmless error to convict a defendant of manslaughter where the indictment charged murder and the evidence justified a verdict for murder. Calicoat v. State, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922).

In a murder trial where there are elements of manslaughter a manslaughter instruction should be given. Lee v. State, 130 Miss. 852, 94 So. 889, 1922 Miss. LEXIS 247 (Miss. 1922).

Where the parties had been engaged in a fight immediately prior to the killing it was not error to give a manslaughter instruction. Springer v. State, 129 Miss. 589, 92 So. 633, 1922 Miss. LEXIS 72 (Miss. 1922).

A murder case in which it is not error to refuse a manslaughter instruction. Leavell v. State, 129 Miss. 579, 92 So. 630, 1922 Miss. LEXIS 70 (Miss. 1922).

Where the defendant is either guilty of murder as charged or entirely innocent, a manslaughter instruction should not be given. Walker v. State, 123 Miss. 517, 86 So. 337, 1920 Miss. LEXIS 50 (Miss. 1920).

If the evidence shows the killing was done in the heat of passion a manslaughter instruction could not be refused. Martin v. State, 112 Miss. 365, 73 So. 64, 1916 Miss. LEXIS 120 (Miss. 1916).

A proper case in which the jury should be told plainly they must either find defendant guilty of murder or acquit him. Rester v. State, 110 Miss. 689, 70 So. 881, 1916 Miss. LEXIS 191 (Miss. 1916), overruled, Calicoat v. State, 131 Miss. 169, 95 So. 318, 1922 Miss. LEXIS 296 (Miss. 1922) (ovrld by Houston v. State (1913) 105 Miss. 413, 62 So. 421); .

A murder charge in which a manslaughter instruction was authorized. Pope v. State, 105 Miss. 133, 62 So. 10, 1913 Miss. LEXIS 188 (Miss. 1913).

A controverted fact in evidence should not be assumed. De Silva v. State, 91 Miss. 776, 45 So. 611, 1907 Miss. LEXIS 190 (Miss. 1907).

The following are cases holding that a manslaughter instruction on a trial of murder is harmless. Rolls v. State, 52 Miss. 391, 1876 Miss. LEXIS 227 (Miss. 1876); Lanier v. State, 57 Miss. 102, 1879 Miss. LEXIS 22 (Miss. 1879); Powers v. State, 83 Miss. 691, 36 So. 6, 1903 Miss. LEXIS 90 (Miss. 1903), overruled, Jones v. State, 144 Miss. 52, 109 So. 265, 1926 Miss. LEXIS 341 (Miss. 1926); Moore v. State, 86 Miss. 160, 38 So. 504, 1905 Miss. LEXIS 55 (Miss. 1905).

9. Applicability to issues.

The giving of an instruction in a manslaughter prosecution to the effect that each person present at the time of and consenting to and encouraging the commission of a crime, and knowingly, wilfully, and feloniously doing an act which is an ingredient in the crime, or immediately connected with it, or leading to its commission, is as much a principle as if he had with his own hand committed the whole offense, was erroneous since such instruction merely stated an abstract principle of law without relating to the particular issues in the case. Kidd v. State, 258 So. 2d 423, 1972 Miss. LEXIS 1500 (Miss. 1972).

All instructions must be restricted to the issues developed by the evidence. Allen v. State, 139 Miss. 605, 104 So. 353, 1925 Miss. LEXIS 170 (Miss. 1925).

It is error to refuse to grant an instruction on an issue raised. De Silva v. State, 91 Miss. 776, 45 So. 611, 1907 Miss. LEXIS 190 (Miss. 1907).

Where, according to defendant's own story, the homicide was either a deliberate murder or was committed in self-defense, the action of the court in refusing an instruction as to manslaughter was correct. Hannah v. State, 87 Miss. 375, 39 So. 855, 1905 Miss. LEXIS 142 (Miss. 1905).

10. Assumption of facts.

In a criminal case, an instruction in which the facts set forth are not justified by the evidence, requiring the utilization of presumptions to supply the essential facts, should neither be requested nor given. Kidd v. State, 258 So. 2d 423, 1972 Miss. LEXIS 1500 (Miss. 1972).

In a prosecution for assault with intent to kill, an instruction under which the nature of the weapon, and the felonious assault were facts to be determined by the jury from the evidence in the case beyond a reasonable doubt, did not assume that a handsaw was a deadly weapon. Cobb v. State, 233 Miss. 54, 101 So. 2d 110, 1958 Miss. LEXIS 356 (Miss. 1958).

The clause of an instruction in a prosecution for burglary and larceny, submitting to the jury for its finding, the burglarious breaking into the house, the taking of certain articles, and their respective values, did not assume that the articles of personal property were of the value mentioned in the indictment, or take away the jury function of determining such values. Spiers v. State, 229 Miss.

663, 91 So. 2d 844, 1957 Miss. LEXIS 312 (Miss. 1957).

State's instruction, in a prosecution for assault and battery with intent to kill, that if they believed beyond a reasonable doubt that accused wilfully, feloniously and with malice aforethought shot and wounded the victim with intent to kill, the jury should find the accused guilty as charged even though they might believe that accused was drunk or drinking at the time, was not misleading as assuming that a crime had been committed, nor was it misleading in any other particular. Wixon v. State, 229 Miss. 430, 90 So. 2d 859, 1956 Miss. LEXIS 622 (Miss. 1956).

Instruction in criminal case must not assume as fact any fact that is in issue, or where there is no evidence to support it. Dickins v. State, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Instruction in murder prosecution is not erroneous as assuming defendant killed victim as it does not assume as fact that defendant inflicted fatal blow when it provides "if the defendant was inflicting blows," the qualifying word "if" eliminating any possibility of there being an unwarranted assumption by jury. Dickins v. State, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

An instruction must not be framed in such language as to introduce the danger that the jury may think therefrom that a disputed or essential fact has been, in the opinion of the court, established as true. Marble v. State, 195 Miss. 386, 15 So. 2d 693, 1943 Miss. LEXIS 169 (Miss. 1943).

An instruction which assumes as true a material fact, the truth of which is for the determination of the jury, is erroneous. Marble v. State, 195 Miss. 386, 15 So. 2d 693, 1943 Miss. LEXIS 169 (Miss. 1943).

Instruction in prosecution for grand larceny, assuming disputed facts that the property belongs to the prosecuting witness and that it was of the value of more than $25, was erroneous. Marble v. State, 195 Miss. 386, 15 So. 2d 693, 1943 Miss. LEXIS 169 (Miss. 1943).

An instruction on an assumption of facts is erroneous. Cunningham v. State, 87 Miss. 417, 39 So. 531, 1905 Miss. LEXIS 128 (Miss. 1905); Stringer v. State, 38 So. 97 (Miss. 1905).

11. Conflicting and inconsistent instructions.

In a burglary prosecution, an instruction to the effect that in order to show a burglary, it was not necessary to establish the actual breaking of a lock, door, or window, was complementary to rather than in conflict with a second instruction that the jury might find the defendant guilty if it believed he broke the lock from the door and thereby gained entry. Branning v. State, 222 So. 2d 667, 1969 Miss. LEXIS 1539 (Miss. 1969).

Accused cannot complain of the giving of a correct instruction for the state, although it is not consistent with the one given more favorably to the accused, where the one given in favor of the accused is erroneous. Haney v. State, 199 Miss. 568, 24 So. 2d 778, 1946 Miss. LEXIS 225 (Miss. 1946).

While it is the duty of jury to obey instructions of the court, a verdict should not be set aside where it is clear that they were guided in their conclusions by a correct instruction, and without regard to an erroneous instruction which was inconsistent therewith. Haney v. State, 199 Miss. 568, 24 So. 2d 778, 1946 Miss. LEXIS 225 (Miss. 1946).

In prosecution of father and son for assault and battery with intent to kill, instruction that if jury believed that father and son, or either of them, was guilty, the jury would be authorized to find both guilty, and instruction that if evidence showed guilt of one beyond reasonable doubt, and failed to show the guilt of the other, the jury should convict the former and acquit the latter, were irreconcilably conflicting. Burnett v. State, 192 Miss. 44, 4 So. 2d 541, 1941 Miss. LEXIS 13 (Miss. 1941).

12. Invasion of province of jury.

A requested instruction that would permit the jury to find the defendant not guilty as acting in self-defense in killing the deceased, or guilty only of manslaughter if the jury believed that the defendant had requested the deceased to depart her premises but that the deceased had refused to do so, was properly refused where such instruction would have denied the jury the right to consider whether the defendant had fired the pistol with malice aforethought and whether there was premeditated design on her part to kill the deceased. Seymore v. State, 261 So. 2d 453, 1972 Miss. LEXIS 1285 (Miss. 1972).

The opening clause of an instruction in a prosecution for burglary and larceny submitting to the jury for its finding, beyond a reasonable doubt, from the evidence, the burglarious breaking into the house, the taking of certain articles, and their respective values, did not assume that the articles of personal property were of the value mentioned in the indictment, or take away the jury function of determining such values. Spiers v. State, 229 Miss. 663, 91 So. 2d 844, 1957 Miss. LEXIS 312 (Miss. 1957).

In a trial on a charge of receiving stolen goods, an instruction that certain detailed facts, if shown, gave rise to a presumption that the defendant had knowledge of their being stolen property invaded the province of the jury and lured them from their duty to acquit the defendant unless they believed from the evidence that he was guilty beyond a reasonable doubt. Pettus v. State, 200 Miss. 397, 27 So. 2d 536, 1946 Miss. LEXIS 302 (Miss. 1946).

Instruction authorizing convictions for manslaughter if the jury believe the evidence, held not to take from jury right to determine whether deadly weapon was used. Starnes v. State, 151 Miss. 156, 117 So. 520, 1928 Miss. LEXIS 290 (Miss. 1928).

Instruction that the strongest proof of the good reputation of the prosecutrix was that no one heard her reputation discussed was erroneous. Welch v. State, 110 Miss. 147, 69 So. 770, 1915 Miss. LEXIS 12 (Miss. 1915).

Instruction should not advise the jury that threats by accused against deceased might be construed with the other testimony in reaching the verdict. Lucas v. State, 109 Miss. 82, 67 So. 851, 1915 Miss. LEXIS 117 (Miss. 1915).

Charge that accused was guilty if he started the trouble by an insult was erroneous, in taking from the jury the right to determine whether the insult excused the assault. Wicker v. State, 107 Miss. 690, 65 So. 885, 1914 Miss. LEXIS 133 (Miss. 1914).

Under the statute the judge cannot invade the province of the jury by informing it what weight should or should not be given to establish facts. Kearney v. State, 68 Miss. 233, 8 So. 292, 1890 Miss. LEXIS 14 (Miss. 1890).

13. Comment on evidence.

Trial court did not err by commenting on the victim's testimony because rather than commenting on the weight or credibility of the victim's testimony, the trial court simply clarified for the jury those body parts to which she had pointed. Lawson v. State, 292 So. 3d 266, 2019 Miss. App. LEXIS 501 (Miss. Ct. App. 2019).

Trial court's instruction that the slight-movement requirement for asportation and the short-time requirement for confinement were sufficient to support the charge of kidnapping was not an impermissible comment on the weight of the evidence because the distance of asportation did not matter in a kidnapping charge, and the asportation could not merely occur incidentally to another crime; while asportation was not a necessary element of kidnapping, the instruction properly stated the elements. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Trial court's question did not amount to a comment on the evidence in violation of Miss. Code Ann. § 99-17-35 when the trial judge questioned defense counsel in order to rule on objections by the prosecution. Manning v. Epps, 695 F. Supp. 2d 323, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. 2009).

Defendant's manslaughter conviction and 20-year prison sentence were upheld where the trial judge did not sum up or comment on defendant's testimony regarding instances of harassment and threats of violence and death made against defendant by the victim; the trial judge's comments were incident to the judge's ruling on the state's objections to the testimony. Washington v. State, 957 So. 2d 426, 2007 Miss. App. LEXIS 353 (Miss. Ct. App. 2007).

Trial judge's explanation of his ruling on defendant's objections to leading questions, stating that information regarding a telephone call was foundational and that he did not think it was offered for the truth of the matter asserted but the fact that the phone call was received, was not an impermissible comment on the evidence, or a communication of his views. Irons v. State, 886 So. 2d 726, 2004 Miss. App. LEXIS 277 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1380 (Miss. 2004).

Trial court properly refused to give a jury instruction that improperly commented upon the evidence. Salman v. State, 2004 Miss. App. LEXIS 72 (Miss. Ct. App. Feb. 3, 2004), cert. denied, 882 So. 2d 234, 2004 Miss. LEXIS 993 (Miss. 2004).

In a prosecution for murder, the trial court's providing the jury with a definition of the M'Naghten rule did not impermissibly single out for particular attention any specific evidence or lack thereof. Russell v. State, 789 So. 2d 779, 2001 Miss. LEXIS 101 (Miss. 2001).

In a prosecution for armed robbery, the court erred when it simply answered "yes" to a question from the jury regarding whether they could convict the defendant of armed robbery without the policeman finding a gun because such constituted an improper comment on the testimony and weight of the evidence. Mickell v. State, 735 So. 2d 1031, 1999 Miss. LEXIS 119 (Miss. 1999).

A cautionary instruction concerning the testimony of a confidential informant was properly eschewed by the court as a comment on the weight of the evidence. White v. State, 722 So. 2d 1242, 1998 Miss. LEXIS 433 (Miss. 1998).

A trial court properly refused a defendant's requested jury instruction that law enforcement officers who appeared as witnesses were to be seen as no more believable than any other witness, since such an instruction would be an improper comment upon the evidence. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

A statement by the trial judge to the jury during the defense counsel's closing argument that "the attorneys will not intentionally try to mislead you" and "if you remember things differently from the attorneys, then your memory and recollection prevails," did not constitute a comment upon the weight of the evidence. Dennis v. State, 555 So. 2d 679, 1989 Miss. LEXIS 465 (Miss. 1989).

In ruling on the admissibility of photographs in a murder prosecution, statements made by the judge indicating that the "photographs should be admitted into evidence for the purpose of sustaining the State's position as to the cause of the injury or death" and that "they will aid or assist the jury in determining the facts" did not constitute an impermissible comment on the evidence. Stokes v. State, 548 So. 2d 118, 1989 Miss. LEXIS 357 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759, 1990 U.S. LEXIS 86 (U.S. 1990).

Trial court did not err in refusing jury instruction that testimony of witness could be discredited or impeached by showing that on prior occasion or occasions he had made statement or statements inconsistent with or contradictory to testimony given at trial, because this would constitute improper comment on testimony. Foster v. State, 508 So. 2d 1111, 1987 Miss. LEXIS 2557 (Miss. 1987), overruled in part, Powell v. State, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

Trial court did not err in refusing to instruct jury that it could consider criminal convictions of witnesses as touching on their credibility because such instruction would have been improper comment on testimony. Foster v. State, 508 So. 2d 1111, 1987 Miss. LEXIS 2557 (Miss. 1987), overruled in part, Powell v. State, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

Trial court did not err in refusing to instruct jury that it could consider whether witness was offered lighter sentence or dismissal of charges of escape in exchange for testimony, in determining weight to place on his testimony, because this would have been improper comment on testimony. Foster v. State, 508 So. 2d 1111, 1987 Miss. LEXIS 2557 (Miss. 1987), overruled in part, Powell v. State, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

In a prosecution for armed robbery, the trial court did not err in refusing to grant an instruction which stated that it was the jury's duty to consider not the quantity of witnesses testifying in the case, but rather the quality of their testimony, since such instruction would have been a comment upon the weight of the evidence in violation of § 99-17-35. Bell v. State, 411 So. 2d 763, 1982 Miss. LEXIS 1914 (Miss. 1982).

In a prosecution for murder the defendant was entitled to an instruction as to his right to carry and use a concealed weapon. Ray v. State, 381 So. 2d 1032, 1980 Miss. LEXIS 1930 (Miss. 1980).

Statement by trial judge to defendant's witness, following his testimony, that "If I catch you telling an untruth here, you will be in front of me here," was a comment on the testimony of the witness and indicated to the jury the weight that they should give to the evidence, and was in violation of this statute. Stallworth v. State, 310 So. 2d 900, 1975 Miss. LEXIS 1916 (Miss. 1975).

In liquor prosecution, instruction that "case like this is easy fabricated and difficult to defend," and if jury had reasonable doubt they should acquit, held properly refused. Maxey v. State, 158 Miss. 444, 130 So. 692, 1930 Miss. LEXIS 77 (Miss. 1930).

14. Weight of evidence.

Circuit court did not err by giving an instruction that the uncorroborated testimony of a sexual battery victim alone was sufficient to sustain a conviction for sexual battery when it was consistent with the circumstances. Willard v. State, 219 So. 3d 569, 2017 Miss. App. LEXIS 262 (Miss. Ct. App. 2017).

In her embezzlement trial, defendant's proferred instruction stated, in part, that good character could in itself be sufficient to generate in the jurors' minds reasonable doubt as to the guilt of defendant such as to require an acquittal, although without it the other evidence would be convincing of guilt. The instruction would have been an improper comment upon the weight of the testimony and the trial court did not err in refusing it. Montgomery v. State, 891 So. 2d 179, 2004 Miss. LEXIS 1374 (Miss. 2004).

While defendant is entitled to have instruction on theory of her defense, that instruction should not single out certain parts of evidence to the point that it amounts to comment on weight of evidence. Manuel v. State, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

In a prosecution for rape, the trial judge was not required to instruct the jury that they should scrutinize the prosecutrix' uncorroborated statement with extreme caution, since this section prohibits a judge from commenting upon the weight of the evidence and an instruction which cautions the jury not to give undue weight to the testimony of a particular witness constitutes such a comment. Goss v. State, 413 So. 2d 1033, 1982 Miss. LEXIS 1998 (Miss. 1982).

In a prosecution for assault on a police officer while acting within the scope of his duty and office, the trial court properly refused to instruct the jury that they were not to give the complaining witness' testimony any added weight merely because he was a law enforcement officer; the requested instruction constituted an impermissible comment upon the weight of evidence. Stewart v. State, 355 So. 2d 94, 1978 Miss. LEXIS 1958 (Miss. 1978).

In a prosecution for manslaughter, the trial court did not err in refusing defendant's requested instruction which was no more than a comment on the weight and worth of the evidence. Evans v. State, 315 So. 2d 1, 1975 Miss. LEXIS 1686 (Miss. 1975).

In prosecution for manslaughter, instructions which either pointed out, directed attention to, or emphasized certain aspects of the testimony given by particular witnesses, in such a manner as to constitute a comment or charge upon a weight of the evidence, or the announced principles of law covered by the given instructions or propositions inapplicable to the issues involved, were properly refused. Hardeman v. State, 216 Miss. 115, 61 So. 2d 797, 1953 Miss. LEXIS 614 (Miss. 1953).

In prosecution for assault and battery with intent to kill and murder, instruction directing jury to take into consideration fact that defendant had another load in his gun and could have used it and killed his alleged victim, if he had so desired, but did not do so because he did not want to kill him, was properly refused as it amounts to a comment on weight of evidence as to whether or not defendant shot with intent to kill and murder. Ceary v. State, 204 Miss. 299, 37 So. 2d 316, 1948 Miss. LEXIS 366 (Miss. 1948).

Court's statement to jury, in prosecution for robbery with deadly weapon, to exclude testimony concerning guns which nobody had identified positively and to consider only testimony concerning dollar bills that had been identified positively as the property of the victim, was held not to be prejudicial error as constituting a commentary upon the weight of the evidence. Cittadino v. State, 199 Miss. 235, 24 So. 2d 93, 1945 Miss. LEXIS 284 (Miss. 1945).

Refusal of court to instruct the jury that if they believe from the evidence that any witness had theretofore, or on the trial, sworn falsely to any material fact or facts in the case, they might disregard the testimony of each such witness altogether was proper, since such instruction was clearly erroneous as being upon the weight of the evidence and the credibility of witnesses and fell under the condemnation visited upon the so-called principle of "falsus in uno." Dolan v. State, 195 Miss. 154, 13 So. 2d 925, 1943 Miss. LEXIS 128 (Miss. 1943).

Instruction that the jury might disregard the entire testimony of one who had wilfully testified falsely on a material matter in the case, though the testimony of any such witness should be corroborated, was properly refused as being argumentative and upon the weight of the evidence and credibility of witnesses. Dolan v. State, 195 Miss. 154, 13 So. 2d 925, 1943 Miss. LEXIS 128 (Miss. 1943).

Court's statement, in denying directed verdict, that question whether deceased died from wounds inflicted by defendant was for jury, held not comment on testimony and instruction on weight thereof. Bumpus v. State, 166 Miss. 276, 144 So. 897, 1932 Miss. LEXIS 311 (Miss. 1932).

An instruction with reference to weight of evidence held not erroneous. Huddleston v. State, 134 Miss. 382, 98 So. 839, 1924 Miss. LEXIS 265 (Miss. 1924).

An instruction held to be upon the weight of evidence and erroneously given. Leverett v. State, 112 Miss. 394, 73 So. 273, 1916 Miss. LEXIS 123 (Miss. 1916).

In prosecution for embezzlement, instruction that the mere failure on the part of defendant, without explanation to turn over to his employer the funds in his hands belonging to it, established guilt, was erroneous. Hampton v. State, 99 Miss. 176, 54 So. 722, 1911 Miss. LEXIS 187 (Miss. 1911).

Instruction that, in passing on the evidence of a non-expert, jury should be governed by the circumstances related by the witness on which he based his opinion, was erroneous, as directing the jury not to give any weight to the opinion of the witness based on the facts detailed. Bacot v. State, 96 Miss. 125, 50 So. 500, 1909 Miss. LEXIS 25 (Miss. 1909).

It is error to instruct the jury not to give any weight to the opinion of a nonexpert witness on facts detailed by him. Bacot v. State, 96 Miss. 125, 50 So. 500, 1909 Miss. LEXIS 25 (Miss. 1909).

Instruction upon the weight of the evidence or which unduly emphasizes parts of the evidence is erroneous. Gordon v. State, 95 Miss. 543, 49 So. 609, 1909 Miss. LEXIS 281 (Miss. 1909).

Instruction that if the jury believe from the evidence, beyond a reasonable doubt, that defendant wilfully and maliciously shot and killed deceased with a deadly weapon at a time defendant was in no imminent danger and when he had no reasonable ground to apprehend such danger, he was guilty of murder, held not on weight of testimony. Brett v. State, 94 Miss. 669, 47 So. 781, 1909 Miss. LEXIS 327 (Miss. 1909).

Error to refuse a charge that if the jury believe from the evidence that the confessions, if any, were brought about by fear, duress, intimidation, or by hope or promise of reward, or that such confessions, if any, were untrue, then they may disregard them altogether. Johnson v. State, 89 Miss. 773, 42 So. 606, 1906 Miss. LEXIS 62 (Miss. 1906).

In a criminal prosecution, an instruction that, "if, from the evidence in this case, you believe any witness testified falsely to a material fact, it is your duty and you should disregard the testimony of such witness," is error. Davis v. State, 89

Miss. 119, 42 So. 541, 1906 Miss. LEXIS 51 (Miss. 1906).

Instructions in criminal cases should be refused if they are upon the weight of the evidence or if there is no evidence on which to predicate them. Tidwell v. State, 84 Miss. 475, 36 So. 393, 1904 Miss. LEXIS 48 (Miss. 1904).

Under this section [Code 1942, § 1530] an instruction for the state in a murder case is erroneous which tells the jury to consider certain evidence only in determining whether the defendant was sane or insane, and if they find him to have been sane, not to consider it as a matter of justification, paliation or excuse for the crime. Maston v. State, 83 Miss. 647, 36 So. 70, 1903 Miss. LEXIS 86 (Miss. 1903).

An instruction that "a confession freely and voluntarily made is among the best evidence known to the law, and that if they believe from the evidence that the defendant made such a confession they are authorized to consider it with the other evidence," etc., is upon the weight of evidence. Thompson v. State, 73 Miss. 584, 19 So. 204, 1895 Miss. LEXIS 148 (Miss. 1895).

An instruction that certain facts alone are not enough to warrant conviction is on the weight of evidence. Burt v. State, 72 Miss. 408, 16 So. 342, 1894 Miss. LEXIS 80 (Miss. 1894).

15. Undue prominence to particular matters.

The trial court properly refused to give an instruction requested by defendant, that no class of testimony is more uncertain than that of identity and that extreme care should be used in scrutinizing such testimony, since such instruction was a comment on the evidence and gave undue weight to a particular class of evidence. Hines v. State, 339 So. 2d 56, 1976 Miss. LEXIS 1658 (Miss. 1976).

Where homicide resulted from shot fired while parties were tussling and quarrelling, instruction that jury might disregard testimony of chief witness if it believed he was at time of homicide unable, from intoxication, to understand and realize what was happening was argumentative and singled out for emphasis parts of the testimony and was therefore properly refused. Wright v. State, 209 Miss. 795, 48 So. 2d 509, 1950 Miss. LEXIS 444 (Miss. 1950).

Instruction which points out and unduly emphasizes any particular bit of testimony in such manner as to amount to comment on weight thereof is improper. Ceary v. State, 204 Miss. 299, 37 So. 2d 316, 1948 Miss. LEXIS 366 (Miss. 1948).

Even though evidence is competent, relevant and important on the issue of guilt or innocence, it is improper for the court to single it out as giving rise, in a prosecution for receiving stolen goods, to a presumption that the defendant had knowledge of their being stolen property. Pettus v. State, 200 Miss. 397, 27 So. 2d 536, 1946 Miss. LEXIS 302 (Miss. 1946).

Instruction which unduly emphasizes parts of the evidence is erroneous. Gordon v. State, 95 Miss. 543, 49 So. 609, 1909 Miss. LEXIS 281 (Miss. 1909).

Instructions giving undue prominence to particular parts of the evidence are properly refused. Illinois C. R. Co. v. Clark, 85 Miss. 691, 38 So. 97, 1904 Miss. LEXIS 186 (Miss. 1904).

16. Instructions as to more than one theory.

Case against defendant was not based entirely on circumstantial evidence, and thus, "2-theory" instruction was not required in defendant's prosecution for cocaine possession, where motel room in which cocaine was found was registered in name of defendant alone and only one key had been issued to its occupant, and defendant's own testimony placed cocaine inside motel room. Petti v. State, 666 So. 2d 754, 1995 Miss. LEXIS 587 (Miss. 1995).

Only where evidence is purely circumstantial, trial court must grant "2-theory" instruction which instructs that if facts are susceptible of 2 interpretations and there is reasonable doubt as to correct interpretation, then jury must resolve such doubt in favor of accused. Petti v. State, 666 So. 2d 754, 1995 Miss. LEXIS 587 (Miss. 1995).

A capital murder defendant was entitled to a "2 theory" instruction where the case was based entirely on circumstantial evidence and there were several facts or circumstances which were susceptible of 2 interpretations, one favorable to the defendant and the other one unfavorable, and therefore the trial court's failure to give the requested 2 theory instructions warranted reversal of the defendant's conviction. Parker v. State, 606 So. 2d 1132, 1992 Miss. LEXIS 563 (Miss. 1992), overruled in part, Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009).

In prosecution for involuntary manslaughter with motor vehicle, refusal of defendant's request for the two-theory instruction is not reversible error, where case does not rest entirely upon circumstantial evidence, and defendant obtained number of instructions admonishing jury that defendant was presumed to be innocent, that burden was upon state to establish his guilt and all the essential elements thereof beyond reasonable doubt. Coleman v. State, 208 Miss. 612, 45 So. 2d 240, 1950 Miss. LEXIS 278 (Miss. 1950).

Refusal of defendant's requested instruction in prosecution for larceny that where two reasonable theories arise from the evidence, one favorable to the state and one favorable to defendant as to guilt or innocence of defendant, it is jury's duty to adopt theory most favorable to the defendant and find him not guilty, was proper. Simmons v. State, 208 Miss. 523, 44 So. 2d 857, 1950 Miss. LEXIS 269 (Miss. 1950).

Refusing to grant defendant's requested instructions in grand larceny prosecution that if the property alleged to have been stolen is shown to have been taken openly and in the presence of the owner or third persons then this carries with it only evidence of trespass was not error in view of the court's other instructions which cured the defect. Oakman v. State, 206 Miss. 136, 39 So. 2d 777, 1949 Miss. LEXIS 248 (Miss. 1949).

This is especially true where the court, in other instructions, has covered the law of the case. Cain v. State, 135 Miss. 892, 100 So. 578, 1924 Miss. LEXIS 80 (Miss. 1924).

An instruction may be refused directing an acquittal if there are two reasonable theories in the mind of the jury, one that defendant is guilty, and one that defendant is innocent. Roux v. Gulfport, 97 Miss. 559, 52 So. 485, 1910 Miss. LEXIS 243 (Miss. 1910); Saucier v. State, 102 Miss. 647, 59 So. 858, 1912 Miss. LEXIS 103 (Miss. 1912); Saucier v. State, 102 Miss. 647, 59 So. 858, 1912 Miss. LEXIS 103 (Miss. 1912).

Instruction that if the evidence presents two reasonable theories, one favorable to the state, and the other to defendant, it is the jury's duty to accept the latter theory and acquit defendant, though the other theory is the more reasonable and supported by the stronger evidence, is properly refused. Runnels v. State, 96 Miss. 92, 50 So. 499, 1909 Miss. LEXIS 24 (Miss. 1909).

Although the state's theory is presented in the state's charges, the court may modify an instruction asked by the accused so as to incorporate the theory upon which a conviction is asked. Smith v. State, 75 Miss. 542, 23 So. 260, 1897 Miss. LEXIS 146 (Miss. 1897).

17. Peremptory instruction.

Because (1) two victims identified defendant as one of the robbers, (2) defendant's former girlfriend testified that defendant had told her of the plans to rob someone and later shown her some of the stolen items, (3) the police recovered some of the stolen items from the woods behind the girlfriend's house, and (4) defendant confessed to the crime, the evidence was sufficient to uphold defendant's conviction for armed robbery; thus, the trial court did not err in denying defendant's motion for a directed verdict, motion for judgment notwithstanding the verdict, and defendant's request for peremptory instructions. Lott v. State, 844 So. 2d 502, 2003 Miss. App. LEXIS 380 (Miss. Ct. App. 2003).

Jury instruction on offense of murder was not peremptory, as it allowed jury to consider homicide less than murder; instruction allowed jury to decide whether shooting was in self-defense. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

If defendant and his witnesses are the only eyewitnesses to homicide and if their version of what happened is both reasonable and consistent with innocence, and if there is no contradiction of that version in physical fact, facts of common knowledge or other credible evidence, then no reasonable juror could find defendant guilty beyond reasonable doubt and, under such circumstances, peremptory instructions must be granted. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A defendant who was convicted of involuntary manslaughter was entitled to a peremptory instruction based on the Weathersby Rule, and the trial court erred in failing to direct a verdict for him where the defendant was the only eyewitness, there was no substantial contradiction in the defendant's statements before and during the trial, and the State presented no evidence which substantially contradicted the defendant's version of the altercation between the victim and the defendant, which indicated that the victim was the aggressor and that the victim died because of a heart attack which was not caused by any action of the defendant. Pritchett v. State, 560 So. 2d 1017, 1990 Miss. LEXIS 206 (Miss. 1990).

In a murder prosecution where the defense was insanity, and where the state introduced testimony to prove that the defendant was sane, and the defendant introduced both lay and expert medical testimony that he was insane, the defendant's motions for a directed verdict at the conclusion of the state's evidence, and again at the conclusion of all the testimony, were properly overruled, the evidence being sufficient to make a question for the jury whether the state had proved beyond a reasonable doubt that the defendant could distinguish right from wrong at the time of the homicide. Smith v. State, 220 So. 2d 313, 1969 Miss. LEXIS 1453 (Miss. 1969).

In a kidnapping prosecution, a defendant who contended that he took no part in the commission of the crime and was guilty of nothing more than a failure to prevent another from kidnapping, beating and robbing the victim, but who admitted that he was present at all times, and who, at the time of his arrest, was in possession of articles taken from the victim, was not entitled to a peremptory instruction, the question of his guilt being for the jury. Hall v. State, 220 So. 2d 279, 1969 Miss. LEXIS 1442 (Miss. 1969).

The trial court committed no reversible error in refusing to grant a peremptory instruction to find the defendant not guilty of murder where he was not convicted of murder but was convicted of manslaughter, a crime that does not require proof of malice or premeditated design to kill. Kinkead v. State, 190 So. 2d 838, 1966 Miss. LEXIS 1397 (Miss. 1966).

The uncontradicted testimony of the accused that after he was awakened in the early morning hours by the noise of someone breaking into his home, he seized his gun and went to the back of the house where he saw the form of a man coming toward him, and upon inquiring who it was, the man cursed him and continued to advance, so that accused, apprehending that the man was about to do him some great bodily harm or kill him, then fired in defense of his own life, was, under the circumstances, reasonable, and, therefore, must be accepted as true, and the accused was entitled to a peremptory instruction. Lee v. State, 232 Miss. 717, 100 So. 2d 358, 1958 Miss. LEXIS 320 (Miss. 1958).

The testimony of accused, charged with murder of his wife, which contained many contradictions as to material matters, as well as the physical facts, and the contradiction of the accused by other credible witnesses in particular matters, established that the accused was not entitled to a peremptory instruction under the rule that where the defendant or his witnesses are the only eyewitnesses to the homicide their version must be accepted unless substantially contradicted in material particulars by credible witnesses, physical facts, or facts of common knowledge. Murphy v. State, 232 Miss. 424, 99 So. 2d 595, 1958 Miss. LEXIS 289 (Miss. 1958).

Evidence, including positive identification of the accused by residents of the dwelling, was sufficient to sustain a conviction of burglariously breaking and entering a house with intent to commit rape, so that the accused was not entitled to a peremptory instruction. McDole v. State, 229 Miss. 646, 91 So. 2d 738, 1957 Miss. LEXIS 308 (Miss. 1957).

Where an indictment charged that the accused unlawfully sold intoxicating liquors, but the state proved that the accused gave the prosecuting witness a gallon of liquor and $1.50 in cash in exchange for a car battery, there was a fatal variance between the indictment and the proof, and the accused is entitled to a peremptory instruction. Elkins v. State, 229 Miss. 323, 90 So. 2d 662, 1956 Miss. LEXIS 612 (Miss. 1956).

Accused was entitled to a peremptory instruction in an armed robbery prosecution where his alibi thoroughly impeached the state's evidence consisting solely of the uncorroborated testimony of an alleged accomplice, a habitual criminal who had not been sentenced although he had plead guilty of the robbery. Pegram v. State, 228 Miss. 860, 89 So. 2d 846, 1956 Miss. LEXIS 575 (Miss. 1956).

Error of court in overruling defendant's motion to exclude state's evidence and for instruction requiring jury to return verdict of not guilty made at conclusion of state's evidence in trial of charge of unlawful possession of intoxicating liquor is waived by defendant who proceeds to introduce evidence in his own behalf. Faust v. State, 43 So. 2d 379 (Miss. 1949).

Lower court is not in error in failing to direct verdict for defendant in prosecution for unlawful possession of intoxicating liquor at conclusion of all evidence when trial court is not given opportunity to pass upon question of whether defendant was entitled to directed verdict because no motion for direction of verdict was made. Faust v. State, 43 So. 2d 379 (Miss. 1949).

When defendant is the only eyewitness to homicide, her version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by creditable witnesses for state, or by physical facts or by facts of common knowledge, and when such evidence shows that the defendant acted upon what then reasonably appeared to be necessary for protection of her life, verdict should be directed in favor of defendant. Lomax v. State, 205 Miss. 635, 39 So. 2d 267, 1949 Miss. LEXIS 453 (Miss. 1949).

In murder prosecution refusal of court to grant peremptory instruction to find defendant not guilty is not error where defendant and his witnesses are only eyewitnesses to homicide and their version is not contradicted by state, but physical facts contradict defendant in his testimony that he was in danger of death or great bodily harm at hands of deceased and that it was necessary for him to strike in self defense. Robinson v. State, 205 Miss. 281, 38 So. 2d 723, 1949 Miss. LEXIS 430 (Miss. 1949).

Trial court cannot be put in error for its failure to direct jury to acquit defendant at conclusion of all evidence when defendant does not elect to stand on record as made when prosecution rested its case, but introduces proof in his own behalf and fails at conclusion of all the evidence to renew his motion for directed verdict. Smith v. State, 205 Miss. 170, 38 So. 2d 698, 1949 Miss. LEXIS 423 (Miss. 1949).

On conflicting evidence a peremptory instruction should not be given. Huddleston v. State, 134 Miss. 382, 98 So. 839, 1924 Miss. LEXIS 265 (Miss. 1924); Dalton v. State, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925).

18. Modification of withdrawal.

Granting of erroneous instruction to state does not constitute reversible error when it is withdrawn after it is read to jury and trial judge refuses to permit jury to consider it. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

A judge is not required to make a modification although the instruction is approximately correct. Hughey v. State, 106 So. 361 (Miss. 1925).

An instruction may be modified, although that does not change the meaning, without error. Matthews v. State, 108 Miss. 72, 66 So. 325, 1914 Miss. LEXIS 170 (Miss. 1914).

By accepting and reading to the jury a modified instruction the defendant waives his right to object to the error modifying it. Williams v. State, 95 Miss. 671, 49 So. 513, 1909 Miss. LEXIS 275 (Miss. 1909).

A case where the court erred in a modified instruction. Spell v. State, 89 Miss. 663, 42 So. 238, 1906 Miss. LEXIS 24 (Miss. 1906).

The court may modify a requested instruction, but it is under no obligation to do so. Johnson v. State, 78 Miss. 627, 29 So. 515, 1900 Miss. LEXIS 164 (Miss. 1900).

19. Cure of error.

In a prosecution for assault and battery with intent to kill, where the defendant was the only witness in his defense on the facts of the case, any error in court's instruction given to state that jury in determining what weight should be given to the testimony of any witnesses had the right to consider what interest the witness may have had in the results of the trial, was cured by an instruction for the defense directing the jury to consider defendant's testimony as that of any other witness, and not to arbitrarily ignore him, simply because he was a defendant in the case. Reed v. State, 237 Miss. 23, 112 So. 2d 533, 1959 Miss. LEXIS 445 (Miss. 1959).

Refusal to grant defendant's requested instructions, in prosecution for grand larceny, was not error, where the instruction given embodied defendant's theory of defense that he was too intoxicated to form requisite intent. Edwards v. State, 207 Miss. 328, 42 So. 2d 230, 1949 Miss. LEXIS 344 (Miss. 1949).

Error, if any, in instruction on circumstantial evidence was cured by a similar instruction granted to and used by the defendant. Holmes v. State, 192 Miss. 54, 4 So. 2d 540, 1941 Miss. LEXIS 12 (Miss. 1941).

An erroneous instruction in a murder case which fails to define the elements of the crime may be cured by instructions given for the defendant. Upton v. State, 143 Miss. 1, 108 So. 287, 1926 Miss. LEXIS 237 (Miss. 1926).

An instruction on the essentials constituting an offense which is erroneous is not cured by other instructions in the same case. Lott v. State, 130 Miss. 119, 93 So. 481, 1922 Miss. LEXIS 184 (Miss. 1922).

20. Subject matter of instructions.

21. —Definition and description of crime; murder or homicide cases.

Where the objective of an instruction is to distinguish culpable negligence manslaughter from depraved heart murder, "culpable negligence" should be defined as "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." Clayton v. State, 652 So. 2d 720, 1995 Miss. LEXIS 136 (Miss. 1995).

In a capital murder prosecution, an instruction on "malice aforethought" was improper where it stated that if the defendant "at the very moment of the fatal shot did so with the deliberate design to take the life of the deceased . . . then it was malice aforethought as if deliberate design had existed in the mind of the defendant for minutes, hours, days or weeks or even years"; however, the instruction was irrelevant and harmless, since there was abundant evidence of premeditation and no evidence that the slaying was a sudden idea of the defendant's. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

In a prosecution for murder, the trial court committed reversible error by giving an instruction stating that "deliberate design" could be formed "at the very moment of the act of violence." Duvall v. State, 634 So. 2d 524, 1994 Miss. LEXIS 140 (Miss. 1994).

A trial court's instruction to the jury that the defendant should be found guilty of capital murder if the jury found that he killed the victim while committing the crimes of kidnapping "or" robbery did not require reversal of the defendant's conviction, in spite of the defendant's contention that the instruction permitted the jury to return a less-than-unanimous verdict because some jurors could have found him guilty of kidnapping but not robbery while other jurors could have found him guilty of robbery but not kidnapping, where the jury's sentencing verdict clearly indicated a finding that the defendant was engaged in both kidnapping and robbery when he murdered the victim, and all 3 crimes of which the defendant was accused occurred as part of a single transaction and were essentially inseparable. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In a capital murder prosecution arising from the defendant's alleged killing of the victim while engaged in the commission of a robbery, the jury instructions defining the crimes of robbery and capital murder were adequate, even though neither instruction specifically mentioned the element of robbery known as "felonious intent," where the language "without authority of the law" was used in the instruction defining capital murder, so that robbery was defined correctly tracking the language of the statute when the 2 instructions were read together. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

It was not error for a trial court to refuse to give a defendant's requested instruction regarding manslaughter by culpable negligence, which offered the civil definition of negligence to permit the jury to compare civil negligence with the culpable negligence required for conviction under § 97-3-47, since such an instruction is not required for comparison purposes. However, this does not mean that trial courts should never give an instruction for such purposes; it is a practice that should be encouraged, especially since juries are inclined to convict under § 97-3-47 when the evidence rises to no more than simple negligence. Robinson v. State, 571 So. 2d 275, 1990 Miss. LEXIS 720 (Miss. 1990).

An instruction in a murder prosecution, in which the defendant was tried as an accessory before the fact, stating that "even if the defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case" was erroneous. To be convicted as an accessory, the defendant must possess the mens rea for the commission of the crime, and the precise state of mind of the defendant has great significance in determining the degree of his or her guilt; an accomplice may be convicted of accomplice liability only for those crimes as to which he or she personally has the requisite mental state. The cumulative effect of the instruction was that the defendant was guilty of murder regardless of his mental state; the instruction affirmatively negated the mens rea requirement and should not have been given. Welch v. State, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

A jury instruction stating that malice aforethought and a premeditated design to kill must exist in the mind of the defendant but for an instant before the fatal act did not constitute reversible error; the defendant would not have been harmed or prejudiced even if the instruction had stated that malice need only exist at the very moment of the fatal act, where the State's theory of the case was that the defendant lured the victim to his home with the deliberate design to murder him, and the defense theory was that the defendant's shooting of the victim was justifiable homicide in response to his finding that the victim had broken into his home and was standing in his hallway holding a hammer, since under the State's theory the malice would have existed long before the fatal shooting and under the defense theory it never existed. Thornhill v. State, 561 So. 2d 1025, 1989 Miss. LEXIS 486 (Miss. 1989).

In a murder prosecution, a trial court committed reversible error in granting a supplemental instruction after the jury had retired, defining "malice aforethought" from Black's Law Dictionary, which stated that "malice aforethought exists where the person doing the act which causes the death has an intention to cause death or grievous bodily harm to any person" and additionally defined malice aforethought as existing when the defendant has an intention "to commit any felony whatever, has the knowledge that the act will probably cause the death or grievous bodily harm to some person, although he does not desire it or even wishes that it may not be caused . . ." Nicolaou v. State, 534 So. 2d 168, 1988 Miss. LEXIS 524 (Miss. 1988).

In a prosecution for assault and battery with intent to kill and murder, an instruction was erroneous which did not embody within it the intent to kill or murder on the part of the defendant, which error was not rectified by other instructions given. Jackson v. State, 246 So. 2d 553, 1971 Miss. LEXIS 1422 (Miss. 1971).

An instruction that if "the defendant, . . . acted with the deliberate design to take the life" of the deceased connoted intent to kill, and failure to use the word "intent" in the instruction did not render it improper. Peterson v. State, 242 So. 2d 420, 1970 Miss. LEXIS 1377 (Miss. 1970).

Part of an instruction which stated in effect that the alleged murderer must have determined to commit the murder and then "settled down with this firm determination" was properly deleted because it indicated a waiting period after determining to commit murder, whereas no definite time is required to form a design to kill, the slayer being guilty of murder so long as malicious intent is present at the time of the killing. Peterson v. State, 242 So. 2d 420, 1970 Miss. LEXIS 1377 (Miss. 1970).

In a prosecution for assault with intent to kill and murder, an instruction to the effect that the jury should convict the defendants if it should find that the defendants committed assault and battery upon the victim "by use of means or force likely to produce death, with the intent to maim or kill and murder" him, was prejudicial error, where the evidence as to intent was inconclusive, as was evidence of facial injuries sustained by the victim of the assault. Johnson v. State, 230 So. 2d 810, 1970 Miss. LEXIS 1572 (Miss. 1970).

In a prosecution for involuntary manslaughter by culpable negligence, a charge to the jury defining culpable negligence as such negligence as evinces a flagrant and reckless disregard for the safety of others or wilful indifference to the injury liable to follow, was erroneous as defining gross negligence rather than culpable negligence. The term culpable negligence in the statute defining manslaughter by culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life. Grinnell v. State, 230 So. 2d 555, 1970 Miss. LEXIS 1551 (Miss. 1970).

In a case where it was alleged that the defendant "stomped" the decedent to death it was not prejudicial error to grant the state's instruction that manslaughter is the killing of a human being without malice with a dangerous weapon in the language of Code 1942, § 2226, although more properly the instruction should have been framed under Code 1942, § 2225. King v. State, 251 Miss. 161, 168 So. 2d 637, 1964 Miss. LEXIS 337 (Miss. 1964).

Where accused was prosecuted under an indictment charging him, jointly with two others, with murder, state's instruction if the jury believed from all the evidence beyond a reasonable doubt that one of the others murdered the deceased, and that accused without being forced or coerced transported the others in his automobile to where they obtained rifles knowing full well that the others intended to murder deceased, and aided, assisted and encouraged them therein, the accused was guilty as charged, was not erroneous. West v. State, 233 Miss. 730, 103 So. 2d 437, 1958 Miss. LEXIS 434 (Miss. 1958).

In a murder prosecution, where the full acceptance of the state's evidence would have sustained a finding that the defendant was guilty of murder, but the jury could, and evidently did, find that the defendant shot in the heat of passion, instructions, both as to murder and manslaughter, were proper. Barnett v. State, 232 Miss. 208, 98 So. 2d 656, 1957 Miss. LEXIS 461 (Miss. 1957).

In a murder prosecution, the trial court did not err in giving state's instruction that, if the jury believed from all the evidence in the case beyond a reasonable doubt that the defendant had deliberately shot and killed the deceased with a deadly weapon, malice might be inferred. Rivers v. State, 245 Miss. 329, 97 So. 2d 236, 1957 Miss. LEXIS 578 (Miss. 1957).

Granting to state of two instructions defining manslaughter and authorizing verdict in that degree is not reversible error in murder prosecution in which there is present no element of manslaughter and jury finds defendant guilty of murder. Merrell v. State, 39 So. 2d 306 (Miss. 1949); Porter v. State, 39 So. 2d 307 (Miss. 1949).

In murder prosecution, instruction for state defining malice aforethought is not erroneous on ground that it omits reference to accidental killing when there is little, if anything, in the record from which inference could be drawn by jury that killing was accidental and this was matter of defense fully submitted to jury under instruction obtained by defendant. Price v. State, 207 Miss. 111, 41 So. 2d 37, 1949 Miss. LEXIS 321 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516, 1949 U.S. LEXIS 1836 (U.S. 1949).

In murder prosecution, instruction for state that malice will be implied from deliberate use of deadly weapon is not proper where all of the facts are in evidence, but court is entitled to consider the law on the question in determining whether issue of murder should be submitted to jury at all. Smith v. State, 205 Miss. 283, 38 So. 2d 725, 1949 Miss. LEXIS 431 (Miss. 1949).

A definition of murder in the exact language of the statute is not error on the ground that it states an abstract legal definition. Dobbs v. State, 200 Miss. 595, 27 So. 2d 551, 29 So. 2d 84, 1946 Miss. LEXIS 330, 1947 Miss. LEXIS 354 (Miss. 1946), cert. denied, 331 U.S. 787, 67 S. Ct. 1318, 91 L. Ed. 1817, 1947 U.S. LEXIS 2295 (U.S. 1947), overruled in part, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

Trial court in murder prosecution did not err in failing to give instructions defining manslaughter in connection with the instruction defining murder in the absence of evidence authorizing a verdict of manslaughter. Farr v. State, 199 Miss. 637, 25 So. 2d 186, 1946 Miss. LEXIS 235 (Miss. 1946).

Error in instruction pertaining to malice in prosecution for assault with intent to murder, was not reversible where evidence was overwhelming that the assault was wholly unjustified, although where guilt is less patent such error would require reversal. Bridges v. State, 197 Miss. 527, 19 So. 2d 738, 1944 Miss. LEXIS 317 (Miss. 1944).

An instruction which erroneously defined manslaughter held reversible error. Cox v. State, 141 Miss. 607, 107 So. 7, 1926 Miss. LEXIS 470 (Miss. 1926).

A case in which the refusal of an instruction to acquit defendant of murder under strong circumstances of manslaughter held not error, although instruction was faulty in failing to embrace the theory of sudden passion. Hughey v. State, 106 So. 361 (Miss. 1925).

Leaving out of an instruction "in the heat of passion" held to be not harmful. Dalton v. State, 141 Miss. 841, 105 So. 784, 1925 Miss. LEXIS 199 (Miss. 1925).

It is not reversible error for an instruction to define murder and manslaughter where there are other instructions covering contingencies on which the accused was justified. McGehee v. State, 138 Miss. 822, 104 So. 150, 1925 Miss. LEXIS 100 (Miss. 1925).

The defendant must have had intent to kill with malice aforethought when he called upon his wife to shoot deceased and an instruction which does not so state is erroneous. Smith v. State, 91 So. 41 (Miss. 1922).

An instruction authorizing the finding of different verdicts in a murder case, which does not attempt to define the crime of murder, held not erroneous. Dixon v. State, 106 Miss. 697, 64 So. 468, 1914 Miss. LEXIS 8 (Miss. 1914).

In a charge for assault with intent to kill and murder the instruction of the court should give the elements of the crime charged. Bell v. State, 90 Miss. 104, 43 So. 84, 1907 Miss. LEXIS 44 (Miss. 1907).

An instruction purporting to define murder under the statute which excludes the statutory words "without authority of law" is erroneous. Ivy v. State, 84 Miss. 264, 36 So. 265, 1904 Miss. LEXIS 38 (Miss. 1904); Rutherford v. State, 100 Miss. 832, 57 So. 224, 1911 Miss. LEXIS 81 (Miss. 1911).

If it is unquestionable that a murder was committed and the only inquiry is as to the identity of the criminal, reversible error cannot be predicated of an instruction, because it refers to the crime as murder. Dean v. State, 85 Miss. 40, 37 So. 501, 1904 Miss. LEXIS 133 (Miss. 1904).

22. — —Other cases.

Instruction on attempted sexual battery that required jury to find, as overt act, defendant's attempt to place his penis into victim's anus, in combination with instruction that charged jury that "in order to prove an attempt to commit sexual penetration, the State must prove that the intended act was prevented from taking place by resistance or other means," fully and correctly charged jury on elements of the crime. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

A trial court committed reversible error in failing to adequately instruct the jury on the elements of attempted capital rape where the instructions did not mention the element of failure to complete the rape or prevention of completion. Henderson v. State, 660 So. 2d 220, 1995 Miss. LEXIS 390 (Miss. 1995).

In a prosecution for aggravated assault, the injuries inflicted upon the victim clearly constituted "serious bodily injury" within the meaning of § 97-3-7(2) where a blow to the head knocked the victim unconscious and opened a flesh wound requiring sutures, the victim's jaw was broken in 2 places, an injury to the victim's arm required surgery under general anesthesia, a bone graft, and the insertion of a metal plate, and the victim was unable to use his arm or return to work for at least 4 weeks; thus, the trial court did not err in refusing the defendant's requested instruction defining serious bodily injury as "injuries involving great risk of death." Fleming v. State, 604 So. 2d 280, 1992 Miss. LEXIS 382 (Miss. 1992).

A jury instruction on accessory before the fact was inadequate where it did not instruct the jury to find beyond a reasonable doubt that the crime was actually committed, but only instructed the jury to determine whether the defendant was an accessory before the fact, leaving them to assume that the occurrence of the crime was an established fact. Wilson v. State, 592 So. 2d 993, 1991 Miss. LEXIS 962 (Miss. 1991).

In a prosecution for grand larceny for theft of an automobile, the trial court did not err in failing to instruct the jury that a necessary element of the crime of grand larceny was that the defendant must have intended to permanently deprive the owner of his automobile, where the court instructed the jury that it should find the defendant guilty of grand larceny if he "did feloniously take, steal, and carry away the property," since the word "feloniously" means done with criminal intent. Deal v. State, 589 So. 2d 1257, 1991 Miss. LEXIS 800 (Miss. 1991).

In a prosecution for accessory before the fact of sale of cocaine, an instruction was sufficient to advise the jury that, before it could find the defendant guilty as an accessory before the fact, it also had to find the fact, where the instruction stated that the jury was required to find that the defendant arranged for the sale of cocaine "and that this occurred in Lauderdale County, Mississippi"; although the quoted language intended to address the point of venue, it sufficiently informed the jury that, before convicting, it was required to find that the sale had occurred in fact. Turner v. State, 573 So. 2d 1340, 1990 Miss. LEXIS 832 (Miss. 1990).

In a prosecution for conspiracy to commit grand larceny involving the stealing of a portable generator, a requested instruction, which stated that before the defendant could be found guilty of conspiracy, the evidence had to show that the defendants "did willfully, unlawfully and feloniously conspire, confederate and agree together and with each other to unlawfully commit grand larceny by stealing a generator . . . " was properly denied since it misstated the law in that it stated that the defendant must have agreed to steal the generator by a more formal agreement than is required. Rose v. State, 556 So. 2d 728, 1990 Miss. LEXIS 37 (Miss. 1990).

There was no potential prejudice to the defendant by virtue of the fact that a jury instruction requested by the state was given combining "form of the verdict" language with an instruction as to the elements of the charged offense. Doby v. State, 532 So. 2d 584, 1988 Miss. LEXIS 500 (Miss. 1988).

Section 97-3-95 creates separate classes of victims. Thus, in a prosecution for sexual battery of a child under the age of 14, the defendant was not entitled to an instruction containing the element "without her consent." Ryan v. State, 525 So. 2d 799, 1988 Miss. LEXIS 251 (Miss. 1988).

Instructions in a criminal case which follow the language of a pertinent statute are sufficient. Crenshaw v. State, 520 So. 2d 131, 1988 Miss. LEXIS 126 (Miss. 1988).

An instruction for the prosecution, granted in a trial of an indictment under Code 1942, § 2179, which stated the elements of the offense in the alternative that the defendant either knew, or had reasonable reason to believe, that he was uttering a forged instrument would ordinarily be fatally defective, for the language of the section requires that the person uttering the instrument must know it to be forged; but such defect may be cured by properly phrased instructions granted on behalf of the defendant. Pierce v. State, 213 So. 2d 769, 1968 Miss. LEXIS 1294 (Miss. 1968).

In a grand larceny prosecution, wherein the defendant was accused of stealing 530 gallons of insecticide of the value of $1,645.00, the trial court did not err in giving the state an instruction as to larceny only of a 55-gallon drum of insecticide of the value of $415.50. Hoke v. State, 232 Miss. 329, 98 So. 2d 886, 1957 Miss. LEXIS 479 (Miss. 1957).

Where the defendant and the county superintendent of education were charged in the indictment with embezzlement of county school funds, a warrant for $1,629.00, an instruction which by its language relieved the prosecution of the burden of proving any particular act of embezzlement was erroneous. O'Harrell v. State, 97 So. 2d 517 (Miss. 1957).

In a prosecution for practicing medicine without a license, court's instruction that if the jury believed that a chiropractor, for compensation, injected vitamins or penicillin into the body of his patients by use of a hypodermic needle for the relief, cure, or palliation of ailment or disease of the body, they were authorized to find him guilty, was not erroneous. Harris v. State, 229 Miss. 755, 92 So. 2d 217, 1957 Miss. LEXIS 323 (Miss. 1957).

State's instruction, which followed the wording of the statute and the indictment, correctly informed the jury of the elements of the crime of second degree arson notwithstanding the fact that it failed to expressly and specifically require the jury to find the accused had the intent to burn the buildings. Dorroh v. State, 229 Miss. 315, 90 So. 2d 653, 1956 Miss. LEXIS 611 (Miss. 1956).

Instruction in prosecution for contributing to delinquency of minor under age of 18 years which does not follow exact language of indictment but follows statute and defines offense is sufficient. Broadstreet v. State, 208 Miss. 789, 45 So. 2d 590, 1950 Miss. LEXIS 299 (Miss. 1950).

In prosecution under Code 1942, § 2232, for involuntary manslaughter with motor vehicle, there is no error in granting to state instruction defining culpable negligence. Coleman v. State, 208 Miss. 612, 45 So. 2d 240, 1950 Miss. LEXIS 278 (Miss. 1950).

In prosecution for assault and battery with intent to kill under Code 1942, § 2011, instruction defining crime with which defendant is charged is sufficient if it sets forth all of the elements of crime and state need not request instruction defining essential elements of crime of murder, though defendant may request such instruction if he desires. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

Instruction requiring only that jury find that an assault was made "with some instrument capable of producing death or great bodily harm" is erroneous, since statute (Code 1942, § 2011), pertaining to assault with intent to kill, requires that the assault be made with "any deadly weapons or other means or force likely to produce death." Williams v. State, 205 Miss. 515, 39 So. 2d 3, 1949 Miss. LEXIS 448 (Miss. 1949).

Instruction for state that if jury believes from evidence beyond every reasonable doubt that defendant is guilty as charged in indictment is prejudicially erroneous as it does not inform jury of elements of crime of forgery for which defendant was being tried. Wilson v. State, 204 Miss. 111, 37 So. 2d 19, 1948 Miss. LEXIS 348 (Miss. 1948).

Inclusion in instruction of words "as charged in the affidavit in this case" is mere surplusage where the instruction, on its face, sets out the essential elements and material substance of charge contained in the affidavit and the granting of the instruction was not reversible error, where there was no dispute of fact that defendant was guilty as charged in the affidavit. Ball v. State, 203 Miss. 521, 36 So. 2d 159, 1948 Miss. LEXIS 300 (Miss. 1948).

Instruction in rape prosecution that if jury believed beyond a reasonable doubt that defendant unlawfully, forcibly, and feloniously assaulted prosecutrix, a female over age of 12 years, and put her in fear of great personal violence, and violently, forcibly and feloniously and against her will, ravaged and carnally knew her, at time and place and in manner and form as charged in indictment, it was jury's duty to find defendant guilty, does not refer the jury to the indictment to ascertain the elements of the crime as they sufficiently appear in the instruction. Rodgers v. State, 204 Miss. 891, 36 So. 2d 155, 1948 Miss. LEXIS 418 (Miss. 1948).

Alleged error in prosecution for assault with intent to murder of failure of instructions for state to define the term "murder" used therein, was not available to defendant where his instructions followed the language used by the state, some defining murder in the language of the statute. Bridges v. State, 197 Miss. 527, 19 So. 2d 738, 1944 Miss. LEXIS 317 (Miss. 1944).

A case in which an instruction did not fully describe the crime held not to be fatal error on appeal. Sullivan v. State, 92 Miss. 828, 46 So. 248, 1908 Miss. LEXIS 224 (Miss. 1908).

23. —Lesser crimes.

Even though victims' wounds were not very serious, defendant was not entitled to instruction on simple assault, as lesser included offense of aggravated assault, where defendant used gun during assault. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

In prosecution for aggravated assault, defendant is entitled to a lesser included offense jury instruction for mayhem as long as there is some proof that shows him to be innocent of aggravated assault, but at same time only guilty of mayhem. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Defendant was not entitled to instruction on mayhem, as lesser included offense of aggravated assault, since same proof that established aggravated assault also established mayhem. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Defendant is not per se entitled to manslaughter instruction in murder case. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Defendant who killed victim during commission of rape and armed robbery was not entitled to manslaughter instruction. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Defendant was not entitled to manslaughter instruction in capital murder prosecution where there was no evidence that he did not intend to kill the victim or that the murder was committed in the heat of passion and evidence was presented as to brutal and intentional nature of the crime. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Capital murder defendant prosecuted for killing while engaged in child abuse was not entitled to jury instruction on manslaughter as lesser included offense given that one act alone may constitute abuse or battery of child. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Planning to conduct robbery of home at time when defendant believed residents would be at church and defendant's statements that he had come to kill residents precluded finding that killings were in heat of passion and, thus, defendant prosecuted on capital murder charges for killing while engaged in commission of child abuse was not entitled to jury instruction on lesser included offense on homicide for killing without malice in heat of passion. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Aggravated assault defendant was not entitled to lesser included offense instruction on simple assault given that multiple stab wounds suffered by both victims were serious and life-threatening, and in light of absence of evidence that defendant was merely negligent in handling knife; evidence precluded finding that injuries were negligently inflicted. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to instruction on lesser included offense of manslaughter; that offense required absence of malice, defined as doing of wrongful act in such manner and under such circumstances that death of human being may result, and victim's manner of death, from breaking of neck bone as part of strangulation or drowning, precluded claim that defendant could have acted without malice. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Defendant was not entitled to instruction on robbery as lesser included offense of felony murder; because victim died as result of injuries suffered during robbery, if defendant was found guilty of robbery, she was also guilty of capital murder. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Lesser included offense instruction should be granted unless trial judge can say, taking evidence in light most favorable to defendant and considering all reasonable inferences which may be drawn in favor of defendant, that no reasonable jury could find defendant guilty of a lesser included offense. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction on manslaughter as lesser included offense of capital murder where killing took place during robbery at which defendant was not present. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Transitional jury instruction in capital murder prosecution, stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, was proper and appropriate. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

In a prosecution for sale of a controlled substance, the mere fact that one must possess a controlled substance before he or she can sell it is not enough to require a lesser included offense instruction on possession of a controlled substance. Reynolds v. State, 658 So. 2d 852, 1995 Miss. LEXIS 335 (Miss. 1995).

In a prosecution for simple assault upon a law enforcement officer, the trial court erred in failing to give an instruction on the lesser included offense of resisting arrest where a reasonable fact-finder could have concluded, based on the evidence presented, that the defendant resisted arrest, but had a reasonable doubt as to whether he "injured" the officer within the meaning of § 97-3-7. Murrell v. State, 655 So. 2d 881, 1995 Miss. LEXIS 234 (Miss. 1995).

No error was committed by a trial court in a capital murder prosecution in refusing to give a manslaughter instruction where the only justification for such an instruction would have been if the slaying had been committed in the heat of passion without premeditation, and premeditation was evidenced by the defendant's actions in arming himself with 2 deadly weapons, getting the victim into a car by trickery, and directing her at knife point to drive into a secluded wooded area miles away where he raped her, cut her throat, and then shot her. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

When a lesser included offense instruction is requested, the better practice in most cases is for the trial court to give such an instruction, with the important proviso that there be some degree of support in the record. Payton v. State, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser included offense of misdemeanor child abuse, since no reasonable juror could find that broken glass slivers in an infant's food does not constitute a means likely to cause "serious" bodily injury. Payton v. State, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser included offense of simple assault, since no reasonable juror could find that the glass slivers were not used in "such a manner as to cause serious bodily harm," and there was no evidence from which a juror could conclude that the infant accidentally ingested the glass. Payton v. State, 642 So. 2d 1328, 1994 Miss. LEXIS 442 (Miss. 1994).

In a prosecution for burglary under § 97-17-33, the trial court did not err in denying an instruction on the lesser included offense of trespass where the defendant argued only that he was not guilty because he had permission to be on the property and that the crime charged should have been "house burglary" rather than "business burglary," and therefore no defense was presented that he was guilty only of trespass. Wilson v. State, 639 So. 2d 1326, 1994 Miss. LEXIS 348 (Miss. 1994).

In a prosecution for possession of marijuana with intent to sell, the trial court erred in refusing to give a lesser included offense instruction which would have allowed the jury to find the defendant guilty of simple possession of marijuana, even though the defendant's alleged accomplice testified that they intended to sell the marijuana, where the defendant was an admitted marijuana user and the amount of marijuana found was not so large as to preclude the purpose of personal use, since the jury was free to disregard the alleged accomplice's testimony that the marijuana was for sale. Perry v. State, 637 So. 2d 871, 1994 Miss. LEXIS 283 (Miss. 1994).

In a prosecution for capital murder, the trial court's failure to instruct the jury on the lesser included offense of simple murder did not constitute reversible error, even though Mississippi law strongly favors the granting of lesser included offense instructions, where the defendant never requested a lesser included offense instruction and failed to object to the court's failure to give one, the record did not support the defendant's assertion that he was entitled to a lesser included offense instruction because the evidence of the three component crimes in the capital murder charge were so intertwined as to be virtually inseparable, and any error was cured by the jury's verdict which by necessary implication found the defendant guilty of simple murder. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A capital murder defendant was not entitled to a manslaughter instruction based upon his claim that he intended to strike the victim over the head with a shotgun and that in doing so it discharged. Having occurred during the course of a robbery, the homicide was capital murder, regardless of the intent of the defendant; there is nothing in § 97-3-19 which requires any intent to kill when a person is slain during the course of a robbery, and it is no legal defense to claim accident or that it was done without malice. Although § 97-3-27 authorizes a conviction of manslaughter only when a person is slain without malice during the commission of felonies generally, certain felonies, including robbery, are specifically excluded. Griffin v. State, 557 So. 2d 542, 1990 Miss. LEXIS 50 (Miss. 1990).

If the defendant in a murder prosecution were entitled to an instruction on manslaughter, he should have submitted a manslaughter instruction to the trial court. Shelton v. State, 274 So. 2d 658, 1973 Miss. LEXIS 1599 (Miss. 1973).

In prosecution for larceny of a cow where neither the state nor the defendant requested an instruction that the jury might find the defendant guilty of a lesser constituent offense, the court was without power to so instruct the jury. Gaston v. State, 222 Miss. 107, 75 So. 2d 434, 1954 Miss. LEXIS 627 (Miss. 1954).

In prosecution for assault and battery with intent to kill and murder where neither the state nor the accused asked for an instruction authorizing the conviction of simple assault, there was no error where the judge did not give such instruction. Bland v. State, 216 Miss. 570, 63 So. 2d 42, 1953 Miss. LEXIS 670 (Miss. 1953).

In prosecution for murder, failure of court to authorize manslaughter verdict is not error where proof showed no element of manslaughter, theory of defense was that of accidental killing, and neither state nor defense requested an instruction on manslaughter. Hendrix v. State, 41 So. 2d 48 (Miss. 1949).

Accused cannot complain of failure to instruct on manslaughter in murder trial, where accused has not requested such instruction in writing. Cosey v. State, 161 Miss. 747, 138 So. 344, 1931 Miss. LEXIS 311 (Miss. 1931).

However under a prosecution for murder where the evidence does not justify a conviction for murder the court should give an instruction on manslaughter without written request if the evidence authorizes a conviction of manslaughter. May v. State, 89 Miss. 291, 42 So. 164, 1906 Miss. LEXIS 7 (Miss. 1906).

24. —Credibility of witnesses, generally.

A trial court was correct in refusing to give a defendant's requested instruction regarding eyewitness identification testimony where the only eyewitness to the crime, the victim, testified that she could not identify her assailant. Thomas v. State, 645 So. 2d 1345, 1994 Miss. LEXIS 574 (Miss. 1994).

A trial court properly refused a defendant's requested cautionary instruction concerning eyewitness identification testimony. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

It was not error for the court to refuse an instruction telling the jury to consider the testimony of a 5-year-old child with precaution. Ivy v. State, 522 So. 2d 740, 1988 Miss. LEXIS 65 (Miss. 1988).

A jury instruction in a criminal case authorizing the jury to consider the motives and interests of any witness in determining whether the witness would be believed was a direct comment by the court upon the weight of the evidence and credibility of the witnesses in violation of this section and impermissibly chilled the right of a defendant to testify in his own defense. Sumrall v. State, 343 So. 2d 481, 1977 Miss. LEXIS 2380 (Miss. 1977).

An instruction that in determining what weight the jury should give the testimony of any witness, they have the right to consider the demeanor upon the witness stand, what interest, if any, the witness has in the results of the trial, if it has been shown by the evidence that he has any, and all other facts and circumstances in the evidence in the case, is erroneous and, if granted, is ground for a reversal. Gulf Coast Milling Co. v. Necaise, 196 So. 2d 363, 1967 Miss. LEXIS 1485 (Miss. 1967).

In a prosecution under an indictment charging accused with attempt to commit sodomy, the trial court properly refused to instruct that if the jury believed that any witness had knowingly and wilfully testified falsely about any material matter in the case, it had the right to disregard the testimony of such witness. Taurasi v. State, 233 Miss. 330, 102 So. 2d 120, 1958 Miss. LEXIS 385 (Miss. 1958).

Where there are several witnesses on a particular issue, the court may instruct the jury in general terms that in passing on testimony of the witnesses they may consider the interest which a witness may have in the result as shown by the evidence. State v. Jennings, 50 So. 2d 352 (Miss. 1951).

Refusal of court to instruct jury that if they were to believe the evidence that any witness had theretofore, or on the trial, sworn falsely to any material fact or facts in the case, they might disregard the testimony of each such witness altogether was proper, since such instruction was clearly erroneous as being upon the weight of the evidence and the credibility of witnesses and fell under the condemnation visited upon the so-called principle of "falsus in uno." Dolan v. State, 195 Miss. 154, 13 So. 2d 925, 1943 Miss. LEXIS 128 (Miss. 1943).

Instruction that the jury might disregard the entire testimony of one who had wilfully testified falsely on a material matter in the case, though the testimony of such witness should be corroborated, was properly refused as being not only argumentative but upon the weight of the evidence and the credibility of witnesses. Dolan v. State, 195 Miss. 154, 13 So. 2d 925, 1943 Miss. LEXIS 128 (Miss. 1943).

Instruction authorizing jury to disregard the whole testimony of a witness "if they believe it untrue" was meaningless, since it would be presumed that the jury would have disregarded any testimony believed to be untrue in the absence of such an instruction, and therefore it was harmless. Campbell v. State, 192 Miss. 49, 4 So. 2d 539, 1941 Miss. LEXIS 11 (Miss. 1941).

Instructing jury that it could consider witness' interest as shown by circumstances held not error under evidence. Callas v. State, 151 Miss. 617, 118 So. 447, 1928 Miss. LEXIS 347 (Miss. 1928), overruled, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

An instruction directing the jury that it may consider manner and demeanor of witness and interest he may have, held error. Hughey v. State, 106 So. 361 (Miss. 1925).

A witness should not be singled out for attack in any instruction. Pigott v. State, 107 Miss. 552, 65 So. 583, 1914 Miss. LEXIS 117 (Miss. 1914); Holliday v. State, 108 Miss. 726, 67 So. 181, 1914 Miss. LEXIS 265 (Miss. 1914).

An instruction which authorizes the jury to arbitrarily disbelieve any witness on account of relationship to accused or otherwise is erroneous. Gables v. State, 99 Miss. 217, 54 So. 833, 1911 Miss. LEXIS 193 (Miss. 1911); Poole v. State, 100 Miss. 158, 56 So. 184, 1911 Miss. LEXIS 7 (Miss. 1911).

It is error for the court to pick out one witness and instruct the jury that he is entitled to as much weight as the other witnesses. Pederre v. State, 99 Miss. 171, 54 So. 721, 1911 Miss. LEXIS 186 (Miss. 1911).

An instruction in which the jury is advised they may consider the interest of a witness held to be good. Waldrop v. State, 98 Miss. 567, 54 So. 66, 1910 Miss. LEXIS 95 (Miss. 1910).

Where there is more than one witness testifying for defense it is not error to instruct the jury that in determining weight to be given to testimony they may consider the interest of the party testifying. Vails v. State, 94 Miss. 365, 48 So. 725, 1908 Miss. LEXIS 49 (Miss. 1908), overruled, Baker v. State, 391 So. 2d 1010, 1980 Miss. LEXIS 2178 (Miss. 1980).

An instruction on the credibility of witnesses is erroneous, which states if any witness has testified falsely to any material matter, jury may disregard it. The false testimony must be knowingly, willfully and corruptly given before the jury is authorized to object to it. Davis v. State, 89 Miss. 119, 42 So. 541, 1906 Miss. LEXIS 51 (Miss. 1906); Bell v. State, 90 Miss. 104, 43 So. 84, 1907 Miss. LEXIS 44 (Miss. 1907); Turner v. State, 95 Miss. 879, 50 So. 629, 1909 Miss. LEXIS 306 (Miss. 1909); Howell v. State, 98 Miss. 439, 53 So. 954, 1910 Miss. LEXIS 80 (Miss. 1910); Waldrop v. State, 98 Miss. 567, 54 So. 66, 1910 Miss. LEXIS 95 (Miss. 1910); State v. Wofford, 99 Miss. 759, 56 So. 162 (Miss. 1911).

25. —Credibility of prosecuting witness.

In a prosecution for simple assault, the defendant was not entitled to have the jury instructed to evaluate the testimony of the victim with caution because he was an admitted drug addict and abuser; such instruction would have been an impermissible comment on the weight of the testimony in violation of this section. Odom v. State, 767 So. 2d 242, 2000 Miss. App. LEXIS 151 (Miss. Ct. App. 2000).

In a prosecution for assault on a police officer while acting within the scope of his duty and office, the trial court properly refused to instruct the jury that they were not to give the complaining witness' testimony any added weight merely because he was a law enforcement officer; the requested instruction constituted an impermissible comment upon the weight of evidence. Stewart v. State, 355 So. 2d 94, 1978 Miss. LEXIS 1958 (Miss. 1978).

Where the party raped has testified it is error to instruct the jury that her uncorroborated testimony should be scrutinized with caution, etc. McArthur v. State, 105

Miss. 398, 62 So. 417, 1913 Miss. LEXIS 220 (Miss. 1913).

26. —Credibility of accused.

Refusal to grant defendant instruction that defendant is competent witness in his own behalf and jury has no right to disregard his testimony or to look upon it with suspicion merely because he is defendant, and if jury has no reason to disbelieve him other than fact that he is defendant, jury should believe his testimony to be truth, does not constitute error. Parrett v. State, 205 Miss. 651, 39 So. 2d 272, 1949 Miss. LEXIS 455 (Miss. 1949); Clark v. State, 39 So. 2d 783 (Miss. 1949).

Where the defendant is only witness it is error for the court to charge the jury that they should consider the interest of witnesses in the result of the trial. Chatman v. State, 102 Miss. 179, 59 So. 8, 1912 Miss. LEXIS 43 (Miss. 1912); Gaines v. State, 48 So. 182 (Miss. 1909).

Where defendant charged with murder was the only witness in his behalf on key issue of trial, and court charged jury to the effect that it had the right to take into consideration the interest which any witness might feel in result of the case and to give to testimony of each witness only such weight as jury thought it entitled to under all the circumstances, such instruction constituted a comment by court on the testimony as well as upon the weight of the evidence, thereby contravening the express terms of this section, requiring reversal and remand for new trial, and the fatal effect of such an instruction cannot be cured by coupling it with a contradictory instruction to the effect that the testimony of defendant may not be “arbitrarily” disregarded simply because he is the defendant. Bryson v. State, 291 So. 2d 693, 1974 Miss. LEXIS 1732 (Miss. 1974).

Where accused is the only witness in his defense, it is error to charge the jury that in determining the weight of the testimony of witnesses, they may consider their demeanor upon the witness stand and their interest, If any, in the result of the trial. Reed v. State, 237 Miss. 23, 112 So. 2d 533, 1959 Miss. LEXIS 445 (Miss. 1959).

In a prosecution for assault and battery with intent to kill, where the defendant was the only witness in his behalf on the facts of the case, an instruction that if the jury had no other reason to disbelieve the defendant than the fact he was a defendant in the case, it was the jury’s sworn duty to believe him, was more than the defendant was entitled to and has been condemned. Reed v. State, 237 Miss. 23, 112 So. 2d 533, 1959 Miss. LEXIS 445 (Miss. 1959).

In a prosecution for the sale of intoxicating liquors, since defendant’s admission, upon cross-examination, that on the day prior to the date of the alleged offense he had been convicted of possessing liquor went to his credibility as a witness, and the loss or impairment of credibility affected both defendant’s character and reputation, the trial court committed reversible error in refusing to instruct that the jury was required to believe from the evidence, beyond a reasonable doubt, that the defendant made the particular sale of liquor, and was not warranted in convicting him for the sale merely because of his former conviction of possessing liquor and the probable attendant character and reputation arising therefrom. Hassell v. State, 229 Miss. 824, 92 So. 2d 194, 1957 Miss. LEXIS 330 (Miss. 1957).

In a prosecution for murder, where the defendant was the only witness for the defense as to killing, it is error to instruct that in determining the credibility of any witness they might consider proof of his having made statements which he denies under oath and where the state’s witness had testified that he had heard defendant threaten deceased, which was denied by the defendant, the court thinking that this was a suggestion of probable falsity of the testimony assumed the discrediting facts in singling out the testimony in the instruction. State v. Jennings, 50 So. 2d 352 (Miss. 1951).

Accused who has testified as witness in his own behalf is entitled to instruction that he is competent witness and that jurors have no right to disbelieve him merely because he is defendant, and his testimony is entitled to such weight, faith and credit as jurors think proper to give it. Conn v. State, 205 Miss. 165, 38 So. 2d 697, 1949 Miss. LEXIS 422 (Miss. 1949), overruled, Baker v. State, 391 So. 2d 1010, 1980 Miss. LEXIS 2178 (Miss. 1980).

In criminal prosecution, refusal of instruction that, if only reason for disbelieving defendant is his interest, jury has sworn duty to believe he spoke truth, held proper. Cook v. State, 150 Miss. 539, 117 So. 344, 1928 Miss. LEXIS 181 (Miss. 1928).

In the trial of a homicide in which the accused was his only witness it was error to charge that the jury should take into consideration his interest in the result of the trial in determining the weight they will give to his evidence. Smith v. State, 90 Miss. 111, 43 So. 465, 1907 Miss. LEXIS 61 (Miss. 1907), overruled, Wells v. State, 96 Miss. 500, 51 So. 209, 1910 Miss. LEXIS 162 (Miss. 1910).

27. —Credibility of accomplice.

A trial court in a burglary prosecution erred in refusing to grant a proposed jury instruction that the testimony of an accomplice should be considered with caution, where the witness alleged that she was approached to be a lookout and she wound up with the stolen property, even though she claimed that she bought the property from the defendant. An accomplice for these purposes is a person who is implicated in the commission of a crime; if the evidence admits the reasonable inference that the witness may have been a co-perpetrator or the sole perpetrator, the cautionary instruction should be given. Burke v. State, 576 So. 2d 1239, 1991 Miss. LEXIS 54 (Miss. 1991).

A trial court's failure to instruct the jurors in an armed robbery prosecution to view accomplices' testimony with caution and suspicion constituted reversible error where there was no physical evidence corroborating the accomplices' testimony, the armed robbery went unsolved for over 5 years, one of the accomplices who testified as a witness was granted absolute immunity in exchange for his testimony and also admitted to committing at least 25 felonies, and the other accomplice had entered a plea of not guilty to the charge of armed robbery, which he confessed to committing in his testimony, and had not yet gone to trial. An instruction given by the trial court directing the jury to consider accomplice testimony with "great care and caution" was insufficient since the difference between being told to exercise "great care" and to regard with "suspicion" is a difference of vast degree; in deleting the requirement to view accomplices' testimony with suspicion, the trial judge effectively diluted the instruction. Wheeler v. State, 560 So. 2d 171, 1990 Miss. LEXIS 197 (Miss. 1990).

When the State is relying on the testimony of coconspirators, a trial judge should not hesitate to grant a cautionary instruction stating that the jury is to regard the testimony with great suspicion and to consider it with caution. Two of the factors in determining whether a trial judge abused his or her discretion in not granting a cautionary instruction regarding the testimony of an accomplice are (1) whether the witness was in fact an accomplice, and (2) whether the witness' testimony was without corroboration. Derden v. State, 522 So. 2d 752, 1988 Miss. LEXIS 71 (Miss. 1988).

An instruction in a homicide prosecution that the testimony of an accomplice which is not unreasonable, improbable, unbelievable, or self-contradictory is alone sufficient to sustain a conviction was error, but not prejudicial where the defendant obtained other instructions relating to the caution and suspicion which jurors should have in mind in considering the testimony of an accomplice to a crime. Wilson v. State, 234 So. 2d 303, 1970 Miss. LEXIS 1404 (Miss. 1970).

A trial court has the power not only to alter or modify a requested instruction, but also the power within its discretion to refuse to grant any instruction regarding the testimony of accomplices, and the refusal to give an instruction to the effect that the law looks with suspicion and distrust on the testimony of any accomplice, and requires the jury to weigh the same with great care and caution was not reversible error. Robinson v. State, 219 So. 2d 916, 1969 Miss. LEXIS 1430 (Miss. 1969).

It is within the discretion of the court whether he shall instruct the jury on request to view testimony of an accomplice with care and caution. Wellborn v. State, 140 Miss. 640, 105 So. 769, 1925 Miss. LEXIS 300 (Miss. 1925).

28. —Circumstantial evidence.

Trial court was not required to give

circumstantial evidence instruction, where defendant had confessed to friend that he killed victim. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Separate instruction, that state was required to prove capital murder defendant's guilt of unwitnessed killing to exclusion of every other hypothesis consistent with innocence, was not required on capital murder charge, even though evidence of guilt was circumstantial, given that jury was properly instructed on state's burden as to circumstantial evidence in other instructions. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

In a prosecution for possession of marijuana with intent to sell, the defendant was not entitled to a circumstantial evidence instruction requiring the prosecution to prove beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis other than that of guilt, his intent to sell marijuana, since no instruction on circumstantial evidence is necessary where intent alone is sought to be proved by circumstantial evidence. Jones v. State, 635 So. 2d 884, 1994 Miss. LEXIS 202 (Miss. 1994).

A trial court did not err in denying a capital murder defendant's proposed circumstantial evidence instruction where there was direct evidence in support of the prosecution's charge, consisting of an eyewitness' testimony and another witness' repetition of the defendant's admission. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In a prosecution for grand larceny for the theft of an automobile, the testimony of a highway patrol officer was sufficient to support the denial of a circumstantial evidence instruction, even though the statements were denied, where the officer testified that the defendant told him he had been driving the automobile in question, the defendant told the officer that his papers were in the glove compartment, the officer retrieved the papers and asked the defendant his name, the defendant responded that his name was on the papers, the officer made up a fictitious name and asked the defendant if that was his name, and the defendant responded affirmatively. Deal v. State, 589 So. 2d 1257, 1991 Miss. LEXIS 800 (Miss. 1991).

A trial judge did not err in refusing a circumstantial evidence instruction in a criminal prosecution where the evidence presented by the State was a mixture of both direct and circumstantial evidence, even though most of the evidence was circumstantial. King v. State, 580 So. 2d 1182, 1991 Miss. LEXIS 319 (Miss. 1991).

A circumstantial evidence instruction was not required in a murder prosecution where witnesses testified as to 2 out-of-court admissions of the murder made by the defendant. While not a "confession," an admission constitutes direct evidence of the crime so that the giving of a circumstantial evidence instruction is not required. Sudduth v. State, 562 So. 2d 67, 1990 Miss. LEXIS 235 (Miss. 1990).

Circumstantial evidence instructions are required when the prosecution is without a confession and without eyewitnesses to the gravamen of the offense charged. Simpson v. State, 553 So. 2d 37, 1989 Miss. LEXIS 475 (Miss. 1989).

An instruction stating that the jury must resolve doubt as to facts or circumstances susceptible of 2 interpretations in favor of the accused is required only in entirely circumstantial evidence cases. Barnes v. State, 532 So. 2d 1231, 1988 Miss. LEXIS 394 (Miss. 1988).

The prosecution's evidence was not wholly circumstantial where the defendant's confession was properly admitted and, therefore, the defendant was not entitled to a circumstantial evidence instruction. Kniep v. State, 525 So. 2d 385, 1988 Miss. LEXIS 11 (Miss. 1988).

In cases based upon circumstantial evidence, the phrase "to a moral certainty," is interchangeable and synonymous with "beyond a reasonable doubt," and thus is not required; only the additional phrase "and to the exclusion of every other reasonable hypothesis" is required. Erving v. State, 427 So. 2d 701, 1983 Miss. LEXIS 2462 (Miss. 1983).

In a homicide prosecution, failure to give the defendant's requested instruction that the state had the burden of excluding every reasonable hypothesis consistent with the defendant's innocence did not constitute reversible error, even though the state relied on certain circumstantial evidence, where the defendant had admitted to one person that he had shot the deceased, and to another that he had killed the deceased, and these admissions were admitted by stipulation. McCraw v. State, 260 So. 2d 457, 1972 Miss. LEXIS 1567 (Miss. 1972).

In a murder prosecution in which one element of the crime essential to conviction was established by circumstantial evidence only, it was error to give an instruction offered by the state which did not include the requirement that the state establish guilt to the exclusion of every reasonable hypothesis. Gilleylen v. State, 255 So. 2d 661, 1971 Miss. LEXIS 1293 (Miss. 1971).

In a murder prosecution based on circumstantial evidence, it was error to refuse to grant an instruction requested by the defendant that in order to be sufficient for conviction the evidence must exclude every reasonable hypothesis other than that of guilt. Pitts v. State, 241 So. 2d 668, 1970 Miss. LEXIS 1358 (Miss. 1970).

Where there was eyewitness testimony and the case was based on known facts, an instruction that the state is required to establish the guilt of the defendant beyond any reasonable hypothesis consistent with the innocence of the defendant, usually given in circumstantial evidence cases, was properly refused. Mangrum v. State, 232 So. 2d 703, 1970 Miss. LEXIS 1634 (Miss. 1970).

As a general rule it is only in cases where the evidence is entirely circumstantial that the jury should be required to exclude every other reasonable hypothesis than guilt before a conviction can be had, and in instances where the evidence was not wholly circumstantial an instruction to that effect should not be granted. Hadley v. State, 254 Miss. 386, 180 So. 2d 920, 1965 Miss. LEXIS 957 (Miss. 1965).

Where, in a prosecution for manslaughter arising out of an automobile accident, much of the testimony was given by eyewitnesses to the event, the accused could not complain of the court's refusal to give an instruction requiring the jurors to believe the accused guilty beyond every reasonable doubt, and to the exclusion of every reasonable hypothesis before voting to convict, which instruction was applicable to cases resting entirely upon circumstantial evidence. Smith v. State, 233 Miss. 886, 103 So. 2d 360, 1958 Miss. LEXIS 453 (Miss. 1958).

Where there is any substantial dispute as to the possession of the stolen property by the accused, the better practice is to instruct that if the jury believes from the evidence beyond every reasonable doubt that the defendant was in possession of the property and that such property was recently stolen, then such possession is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt of larceny. Fogle v. State, 231 Miss. 746, 97 So. 2d 645, 1957 Miss. LEXIS 561 (Miss. 1957).

An accused, whose burglary conviction did not rest entirely upon circumstantial evidence, who had requested and received instructions telling the jury that in order to convict they needed only to believe defendant guilty beyond a reasonable doubt, could not complain that no instruction contained the qualification that in order for his guilt to appear beyond every reasonable doubt the evidence had to exclude every reasonable hypothesis consistent with his innocence, where the trial court was not requested to grant such an instruction. Poole v. State, 231 Miss. 1, 94 So. 2d 239, 1957 Miss. LEXIS 486 (Miss. 1957).

In a homicide prosecution, where practically all of the evidence was direct testimony, the defendant was not entitled to an instruction that the state's proof must exclude every other reasonable hypothesis consistent with his innocence. Reed v. State, 229 Miss. 440, 91 So. 2d 269, 1956 Miss. LEXIS 624 (Miss. 1956).

Instruction in prosecution for receiving stolen goods that possession of recently stolen property by a defendant is a circumstance strongly indicative of guilt and that it will justify, support, or warrant a verdict for the state, is improper, where such possession is unaided by other proof tending to show that the accused received such property knowing it to have been stolen. Crowell v. State, 195 Miss. 427, 15 So. 2d 508, 1943 Miss. LEXIS 158 (Miss. 1943).

Cases in which an instruction on circumstantial evidence was held to be erroneous. Williams v. State, 95 Miss. 671, 49 So. 513, 1909 Miss. LEXIS 275 (Miss. 1909); Permenter v. State, 99 Miss. 453, 54 So. 949, 1911 Miss. LEXIS 210 (Miss. 1911); Simmons v. State, 105 Miss. 48, 61 So. 826, 1913 Miss. LEXIS 180 (Miss. 1913); Ellis v. State, 108 Miss. 62, 66 So. 323, 1914 Miss. LEXIS 168 (Miss. 1914).

A jury should not be instructed that certain evidence is legal and competent. Williams v. State, 95 Miss. 671, 49 So. 513, 1909 Miss. LEXIS 275 (Miss. 1909).

The jury should not be instructed that circumstantial evidence is as good as any other kind. Haywood v. State, 90 Miss. 461, 43 So. 614, 1907 Miss. LEXIS 81 (Miss. 1907).

29. —Reasonable doubt; murder or homicide cases.

In a prosecution for murder, an instruction for the defendant to the effect that if the jury is not satisfied beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that the defendant did wilfully, unlawfully, feloniously, and of malice aforethought, kill and murder the named decedent, then you find defendant not guilty was properly refused; for the instruction is not limited to finding him guilty of murder, but the jury is thereby instructed that granted such findings they could not convict for any offense whatever. Pitts v. State, 257 So. 2d 521, 1972 Miss. LEXIS 1463 (Miss. 1972).

In a murder prosecution, refusal of the trial court to grant an instruction that if the jury should not be satisfied in their own minds beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that the defendant had wilfully, unlawfully, feloniously, and of his malice aforethought, kill and murder the victim, then it could not find him guilty of anything, was proper where there was evidence from which the jury was fully justified in returning a verdict of guilty of manslaughter. Pitts v. State, 257 So. 2d 521, 1972 Miss. LEXIS 1463 (Miss. 1972).

In a murder prosecution, it was reversible error to instruct the jury that the presumption of innocence does not shield from punishment one who is in fact guilty, and that, regardless of the presumption of innocence and to the state's burden of proof, the jury had a duty to find the defendant guilty if they believed from the evidence beyond a reasonable doubt that he was guilty. Gilleylen v. State, 255 So. 2d 661, 1971 Miss. LEXIS 1293 (Miss. 1971).

In a murder prosecution based on circumstantial evidence, it was reversible error to charge the jury that it did not have to know that the defendant was guilty in order to convict him, and that all that was necessary for the jury to convict was belief from the evidence beyond a reasonable doubt that he was guilty. Pitts v. State, 241 So. 2d 668, 1970 Miss. LEXIS 1358 (Miss. 1970).

In a murder prosecution, an instruction to the effect that, in order to acquit, the jury need not be satisfied that the defendant was in fact innocent, but if there should arise from the evidence any reasonable probability of innocence then the defendant should be entitled to acquittal, for a reasonable probability of innocence is always a reasonable doubt of guilt and the probability of innocence need not be as reasonable as the probability of guilt, was an overlong paraphrase of the so-called two-theory type of instruction given in cases resting entirely on circumstantial evidence and would have been confusing and misleading to the jury, and was properly refused, where the issue of the defendant's guilt did not rest entirely on circumstantial evidence and the defendant was granted a detailed instruction covering the same subjects attempted to be set forth in the refused instruction. United Geophysical Corp. v. Berry, 230 So. 2d 217, 1970 Miss. LEXIS 1547 (Miss. 1970).

On a prosecution for murder there was no error in refusing an instruction that the jury might conscientiously believe defendant guilty, yet might not believe it beyond a reasonable doubt, and that in such case they should acquit. Regan v. State, 87 Miss. 422, 39 So. 1002, 1905 Miss. LEXIS 149 (Miss. 1905).

On a murder trial an instruction to convict if after considering all the evidence the jury conscientiously believe beyond a reasonable doubt that the defendant is guilty does not in the use of the word "conscientiously" prejudicially qualify the doctrine of reasonable doubt. Moore v. State, 86 Miss. 160, 38 So. 504, 1905 Miss. LEXIS 55 (Miss. 1905).

30. — —Other cases.

In a prosecution for the sale of cocaine, the trial court did not err in refusing an instruction stating that even if the jury "strongly believe[d]" that the defendant committed the offense, he must be found not guilty if the State failed to prove beyond a reasonable doubt that he sold cocaine. Moore v. State, 631 So. 2d 805, 1994 Miss. LEXIS 73 (Miss. 1994).

In cases based upon circumstantial evidence, the phrase "to a moral certainty," is interchangeable and synonymous with "beyond a reasonable doubt," and thus is not required; only the additional phrase "and to the exclusion of every other reasonable hypothesis" is required. Erving v. State, 427 So. 2d 701, 1983 Miss. LEXIS 2462 (Miss. 1983).

Where a conviction for embezzlement rested on circumstantial evidence, it was prejudicial error to instruct that the burden on the state was solely that of proving guilt beyond a reasonable doubt rather than to a moral certainty, and to the exclusion of every other reasonable hypothesis except that of guilt, even though there was no request for an instruction as to the exclusion of every other hypothesis since it is the law in criminal cases that where there are two reasonable hypothesis arising out of and supported by the evidence, it is the duty of the jury to adopt the one consistent with innocence even though the hypothesis of guilt be more probable. Barrett v. State, 253 So. 2d 806, 1971 Miss. LEXIS 1225 (Miss. 1971).

A decision of the Mississippi Supreme Court, holding the granting of an instruction that the jury does not have to actually know that a defendant is guilty before it can convict him to be reversible error, would not be applied retroactively. Johnson v. State, 252 So. 2d 221, 1971 Miss. LEXIS 1196 (Miss. 1971), cert. denied, 405 U.S. 991, 92 S. Ct. 1262, 31 L. Ed. 2d 459, 1972 U.S. LEXIS 3301 (U.S. 1972).

The giving of the "do not have to know" instruction in a rape prosecution tried before September 28, 1970, was not reversible error. South Mississippi Electric Power Ass'n v. Pryor, 246 So. 2d 920, 1971 Miss. LEXIS 1431 (Miss. 1971).

The giving of an instruction that the jury need not know that the defendant is guilty in order to convict but need only believe beyond a reasonable doubt that he is guilty is reversible error. Kent v. State, 241 So. 2d 657, 1970 Miss. LEXIS 1353 (Miss. 1970).

It was reversible error to grant the state an instruction that in order for the jury to find the defendant guilty it need not know that he was guilty, but only need believe from the evidence beyond a reasonable doubt that he was guilty as charged, and that if the jury did so believe it was under a sworn duty to find the defendant guilty as charged, such instruction having been repeatedly condemned by the Supreme Court of Mississippi. Spencer v. State, 240 So. 2d 260, 1970 Miss. LEXIS 1279 (Miss. 1970).

The instruction that the jury does not have to know that the defendant is guilty of the crime charged in the indictment before being warranted in convicting him, and that all that the law requires is that the jury must believe from the evidence beyond a reasonable doubt that the defendant is guilty as charged, falls within that class of instructions which would be better not to give but which, in themselves, do not constitute reversible error. McGill v. State, 235 So. 2d 451, 1970 Miss. LEXIS 1447 (Miss. 1970).

In an armed robbery prosecution, an instruction to the effect that the jury did not have to know that the defendant was guilty as charged before it would be justified in convicting him, and that all that the law required was that the jury believe from the evidence beyond a reasonable doubt that the defendant was guilty as charged, was not reversible error. Graham v. State, 229 So. 2d 548, 1969 Miss. LEXIS 1245 (Miss. 1969).

In a prosecution for burglary, an instruction that the jury did not have to know that the defendant was guilty of the crime charged before being warranted in convicting him, but that all that the law required was that the jury must find from the evidence beyond a reasonable doubt that the defendant was guilty, and so believing, it would be the jury's duty to find the defendant guilty as charged, was not reversible error. Craig v. State, 222 So. 2d 116, 1969 Miss. LEXIS 1510 (Miss. 1969).

An instruction for the state to the effect that the jury does not have to know that the defendant is guilty of the crime charged before being warranted in convicting him; but that all the law requires is that the jury must believe from the evidence in the defendant's guilt, is erroneous and defective without a qualifying proviso that the jury must believe in the defendant's guilt from the evidence beyond a reasonable doubt. Russell v. State, 220 So. 2d 334, 1969 Miss. LEXIS 1457 (Miss. 1969).

A defendant, whose burglary conviction did not rest entirely upon circumstantial evidence, who had requested and received instructions telling the jurors that in order to convict they needed only to believe defendant guilty beyond every reasonable doubt, could not complain that no instruction granted him contained the necessary qualification that in order for his guilt to appear beyond every reasonable doubt the evidence had to exclude every reasonable hypothesis consistent with his innocence, where the trial court was not requested to grant such an instruction. Poole v. State, 231 Miss. 1, 94 So. 2d 239, 1957 Miss. LEXIS 486 (Miss. 1957).

In a prosecution for the sale of intoxicating liquors, since defendant's admission, upon cross-examination, that on the day prior to the date of the alleged offense he had been convicted of possessing liquor went to his credibility as a witness, and the loss or impairment of credibility affected both defendant's character and reputation, the trial court committed reversible error in refusing to instruct that the jury was required to believe from the evidence, beyond a reasonable doubt, that the defendant made the particular sale of liquor, and that they were not warranted in convicting him for the sale merely because of his former conviction of possessing liquor and the probable attendant character and reputation arising therefrom. Hassell v. State, 229 Miss. 824, 92 So. 2d 194, 1957 Miss. LEXIS 330 (Miss. 1957).

In a homicide prosecution, where practically all of the evidence was direct testimony, the defendant was not entitled to an instruction that the state's proof must exclude every other reasonable hypothesis consistent with his innocence. Reed v. State, 229 Miss. 440, 91 So. 2d 269, 1956 Miss. LEXIS 624 (Miss. 1956).

Where the accused's alibi defense to an armed robbery charge was supported by strong testimony of apparently disinterested witnesses while the state's evidence that the accused was the perpetrator was weak, being the testimony of the victim, who, under the circumstances, had only a limited opportunity to observe at the time of the crime, the trial court committed reversible error in failing to instruct that if there was a probability of the accused's innocence, the jury should acquit him; such instruction should have been to the effect that the evidence in support of the alibi need only raise in the minds of the jury reasonable doubt as to the accused's presence at the time and the place of the crime. Newton v. State, 229 Miss. 267, 90 So. 2d 375, 1956 Miss. LEXIS 606 (Miss. 1956).

Instruction in prosecution for robbery with firearms which makes effort to define reasonable doubt is bad, but not harmful error when by other instructions defendant has obtained fair and full statement of law applicable to case. Passons v. State, 208 Miss. 545, 45 So. 2d 131, 1950 Miss. LEXIS 273 (Miss. 1950), overruled, Simmons v. State, 568 So. 2d 1192, 1990 Miss. LEXIS 605 (Miss. 1990).

Instruction in burglary prosecution that the crime charged may be proven by circumstances, and it is not necessary to have eyewitness to deed if circumstances in evidence are sufficient to create in minds of jury belief that accused is guilty beyond reasonable doubt and to exclusion of every other reasonable hypothesis than that of guilt of accused is correct charge to jury. Bone v. State, 207 Miss. 868, 43 So. 2d 571, 1949 Miss. LEXIS 398 (Miss. 1949).

Instruction to jury in burglary prosecution that before defendant could be found guilty of charge against him, minds of jury must be satisfied of his guilt beyond every reasonable doubt, and to exclusion of every hypothesis, is more favorable to defendant than applicable law and he suffered nothing by omission of word "reasonable" which should have modified "hypothesis." Bone v. State, 207 Miss. 868, 43 So. 2d 571, 1949 Miss. LEXIS 398 (Miss. 1949).

Refusal of defendant's requested instruction in a prosecution for grand larceny that defendant is entitled to the individual verdict of each juror and that any doubts as to defendant's guilt must be resolved in favor of the defendant was proper since the requirement that the doubt must be reasonable was omitted. Clark v. State, 39 So. 2d 783 (Miss. 1949).

An instruction that the jury will return a verdict of guilty if "satisfied" that the accused committed the crime charged is erroneous, but not fatally so if another instruction supplies, in haec verba, the missing element "beyond every reasonable doubt." Pettus v. State, 200 Miss. 397, 27 So. 2d 536, 1946 Miss. LEXIS 302 (Miss. 1946).

Omission of word "doubt" in sole instruction in larceny prosecution that "if you believe by the evidence beyond all reasonable that the defendant did feloniously take, steal and carry away" the personal property, is reversible error. Hurst v. State, 197 Miss. 571, 18 So. 2d 923, 1944 Miss. LEXIS 322 (Miss. 1944).

Omission of words, "from the evidence," in instruction in criminal prosecution for prostitution, that all that was required was that jury believed that defendant was guilty beyond a reasonable doubt, constituted reversible error, where such defect was not cured by other instructions. Imbraguglio v. State, 196 Miss. 515, 18 So. 2d 294, 1944 Miss. LEXIS 224 (Miss. 1944).

Instruction, if defendant's good character with other evidence raised probability of his innocence, there was reasonable doubt of guilt, held properly refused. Calloway v. State, 155 Miss. 706, 125 So. 109, 1929 Miss. LEXIS 350 (Miss. 1929).

It is error to omit from the instruction that the jury must acquit the defendant if they have reasonable doubt of his guilt from the evidence or for want of evidence. Cumberland v. State, 110 Miss. 521, 70 So. 695, 1915 Miss. LEXIS 77 (Miss. 1915).

An instruction authorizing the conviction of the defendant if the minds and consciences of the jury are fully satisfied of his guilt is erroneous. The jury should not convict unless satisfied of the guilt beyond every reasonable doubt arising from the evidence. Jones v. State, 84 Miss. 194, 36 So. 243, 1904 Miss. LEXIS 23 (Miss. 1904).

31. —Self-defense, generally.

In absence of any other instruction that presented defendant's theory of defense to jury, trial court improperly failed to place defendant's proffered instruction, on self-defense by use of deadly weapon against larger, unarmed person, in proper form, in light of evidence which supported claim of justification. Manuel v. State, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

32. —In murder or homicide cases.

A trial court in a murder prosecution committed reversible error when it granted the prosecution's instruction informing the jury that before it could accept the theory of self-defense, it was required to find that the danger was so urgent that the defendant had no "reasonable mode of escape"; this instruction was not supported by law because it deprived the defendant of the right to claim self-defense if he could have avoided the threat to his safety by escaping. Craig v. State, 660 So. 2d 1298, 1995 Miss. LEXIS 405 (Miss. 1995).

A trial court in a murder prosecution committed reversible error when it refused the defendant's requested instruction that a person "may stand his ground" without waiving the right to self-defense, so long as "he is in a place where he has a right to be, and is himself in no unlawful enterprise, not the provoker or aggressor in the combat." Craig v. State, 660 So. 2d 1298, 1995 Miss. LEXIS 405 (Miss. 1995).

A trial court in a murder prosecution did not err in giving an instruction precluding the jury from considering a claim of self-defense if the jury found that the defendant armed himself and sought the victim with the intent of invoking a difficulty with the victim, or voluntarily entered into a difficulty with the victim with the intent to cause serious bodily harm, where the defendant armed himself with a shotgun while he was in no physical danger from the victim, he drove to the victim's house and honked his automobile horn, he drove by the house several times waiting for the victim to appear, and he claimed that he shot at the victim's feet but the trajectory of the shotgun pellets was upward. Hart v. State, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

In a homicide prosecution, the trial court's giving of an "arming" instruction improperly cut off the jury's consideration of self-defense and constituted reversible error where there was testimony to support the defendant's theory of self-defense, and the instruction stated that the defendant could not plead self-defense if he armed himself with a deadly weapon and either confronted the victim with the intention of causing a difficulty with the victim or voluntarily entered into any difficulty with the victim with the intent to cause serious bodily harm; such "arming" instructions place a higher burden on a defendant to assert a claim of self-defense than is required by law, are looked upon with disfavor, and should rarely be used. Keys v. State, 635 So. 2d 845, 1994 Miss. LEXIS 164 (Miss. 1994).

In a prosecution for murder, the trial court committed reversible error in refusing a requested defense instruction stating that the defendant had a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack, where the prosecuting attorney pointed out in his argument before the jury that the victim was not armed, from which the jury might have inferred that the defendant was in the wrong in being armed. Duvall v. State, 634 So. 2d 524, 1994 Miss. LEXIS 140 (Miss. 1994).

An instruction estopping one from asserting self-defense is not proper except in the few rare cases where all the elements of estoppel are clearly present; the reason for permitting a self-defense theory to be decided by a jury far outweighs the reasons for estopping one from asserting this most basic right. Thompson v. State, 602 So. 2d 1185, 1992 Miss. LEXIS 403 (Miss. 1992).

In a prosecution for murder, jury instructions stating that the defendant could not claim the right of self-defense if he armed himself with a gun in advance and provoked the encounter with the victim were not supported by the evidence where the defendant was the owner and operator of a lounge engaged in the business of selling intoxicating liquor to patrons, the victim had been on the premises most of the day armed with a loaded pistol, the defendant requested the victim to take his pistol and leave, the defendant left to run an errand and when he returned the victim was still in the lounge, intoxicated, and in possession of the pistol, and the ensuing fatal encounter involved disputed facts; moreover, the granting of 2 self-defense instructions did not cure the error since the instructions were conflicting. Thompson v. State, 602 So. 2d 1185, 1992 Miss. LEXIS 403 (Miss. 1992).

A requested instruction in a prosecution for murder, that if defendant believed that he was threatened with great bodily harm he had a lawful right to carry a concealed deadly weapon, and that while so armed he had a right to use it in his own defense, is proper and not comment on the evidence. Ray v. State, 381 So. 2d 1032, 1980 Miss. LEXIS 1930 (Miss. 1980).

It is a rare occasion when an instruction cutting off the right of self-defense is proper in a murder prosecution. Dismukes v. State, 285 So. 2d 165, 1973 Miss. LEXIS 1279 (Miss. 1973).

Where one of defendant's instructions presented to the jury his defense that he was repelling an attack by an armed man and another instruction stated his right of self-defense, a third instruction was properly refused because defendant's defense was that he was being attacked by an armed aggressor, under such claim, an instruction based on disparity of size of the defendant and victim and on physical conditions of the 2 had no application. Cochran v. State, 278 So. 2d 451, 1973 Miss. LEXIS 1446 (Miss. 1973).

Instruction in manslaughter prosecution that defendant was justified in using a pistol to protect herself from an unjustifiable and deadly attack by the victim if the jury believed that the victim was stronger and physically more powerful than defendant and that defendant was incapable of combating with him in a physical combat, was properly refused where there was no evidence referring to the physical size of either the victim or the defendant nor did it reflect any physical altercation or imminent apprehension of such, and, in fact, the victim and the defendant were separated by the bar of the tavern when the fatal shot was fired. Smith v. State, 278 So. 2d 454, 1973 Miss. LEXIS 1447 (Miss.), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474, 1973 U.S. LEXIS 1624 (U.S. 1973).

In a manslaughter prosecution the giving of an instruction that the law tolerates no excuses and accepts no justification for the taking of human life upon the plea of self-defense, unless it be reasonably necessary to save the life of the defendant or save the defendant from great bodily harm at the very time of the fatal shot, was reversible error. Nicholson v. State, 243 So. 2d 552, 1971 Miss. LEXIS 1515 (Miss. 1971).

In a manslaughter prosecution, instructions on the right to "act on appearances" and "self-defense" were properly refused where the defendant had testified that he did not strike the fatal blow and further, having claimed that he himself was knocked down during the affray, said that he could not say who and struck him. Mangrum v. State, 232 So. 2d 703, 1970 Miss. LEXIS 1634 (Miss. 1970).

An instruction that the law tolerates no excuse and accepts no justification for the taking of human life upon the plea of self-defense, unless it be reasonably necessary to save the slayer's life, or to save him from some great bodily harm, at the time of the fatal blow is erroneous, for although the danger must be imminent and impending it need not necessarily occur at the very instant the fatal blow is struck. Farmer v. Thomas, 207 So. 2d 96, 1968 Miss. LEXIS 1598 (Miss. 1968).

A request to instruct in a murder prosecution that jury should not hold defendant to the same calm, cool, clear, collected and precise judgment which they are now able to exercise "but that you should, as nearly as you can, in the place and circumstances at the time of the shooting" and judge whether defendant acted as a reasonably prudent person would have acted under similar circumstances, and if so found, to find him not guilty, is properly denied as so improperly drawn as to confuse the jury. Robinson v. State, 234 Miss. 149, 105 So. 2d 766, 1958 Miss. LEXIS 476 (Miss. 1958).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, instructions permitting the jury to find that accused did not kill his father-in-law in necessary self-defense, but had murdered him, constituted reversible error where accused had already been acquitted of the charge of murdering his father-in-law. Dykes v. State, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, the husband, having already been acquitted of the charge of murdering his father-in-law, was entitled to an instruction that if at the time he shot at his father-in-law while acting in necessary self-defense, his wife, without his knowledge, stepped into the line of fire and was accidentally killed, the husband was not guilty of murder. Dykes v. State, 232 Miss. 379, 99 So. 2d 602, 1957 Miss. LEXIS 484 (Miss. 1957).

Instruction that if jury believed beyond a reasonable doubt that defendant killed victim at a time when he was in no immediate danger, real or apparent, of losing his life or suffering some great bodily harm at the hands of victim, then defendant is guilty, etc., was not erroneous as excluding from consideration of jury that if defendant reasonably believed or had reasonable cause to believe that he was in danger of losing his life or suffering some great bodily harm at the hands of deceased he had a right to take deceased's life in defending himself even though he might have been in no actual danger whatever, especially in view of other instructions embodying the principle contended for by defendant. Johnson v. State, 46 So. 2d 924 (Miss. 1950).

That an elderly father in ill health who claimed to have shot his robust son as he threateningly advanced upon the father in his bed was denied his defense of self-defense by an instruction that the homicide could not be excused by the mere fact that the defendant was a smaller man than the deceased, of less powerful build and proportions and of greater years, and was assaulted by the deceased with his fists at the time of the slaying, constituted reversible error. Bailey v. State, 202 Miss. 221, 31 So. 2d 123, 1947 Miss. LEXIS 262 (Miss. 1947).

An instruction explaining the distinction between murder and manslaughter was sufficient on the issue of self-defense. Magee v. State, 200 Miss. 861, 27 So. 2d 767, 1946 Miss. LEXIS 347 (Miss. 1946).

The burden of proof is not shifted to the defendant by an instruction that in order to justify a homicide on the plea of self-defense there must be something showed in the conduct of the deceased indicating a present intention to kill or to do some great personal injury to the slayer, and imminent danger of such intention being accomplished. Dobbs v. State, 200 Miss. 595, 27 So. 2d 551, 29 So. 2d 84, 1946 Miss. LEXIS 330, 1947 Miss. LEXIS 354 (Miss. 1946), cert. denied, 331 U.S. 787, 67 S. Ct. 1318, 91 L. Ed. 1817, 1947 U.S. LEXIS 2295 (U.S. 1947), overruled in part, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

Instructions in murder prosecution that to justify a homicide on the plea of self-defense, there must be something shown in the conduct of the deceased indicating present intention to kill or to some great personal injury to the slayer, and that there was immediate danger, real or apprehended, of such intention being accomplished, were proper. Williams v. State, 14 So. 2d 216 (Miss. 1943).

Although the proof may show that defendant armed himself for the difficulty yet if he abandoned the intent to kill and abandoned the difficulty and did the killing in self-defense afterwards an instruction denying him the right of self-defense is erroneous. Adams v. State, 136 Miss. 298, 101 So. 437, 1924 Miss. LEXIS 135 (Miss. 1924).

In a prosecution for homicide, instruction that defendant's belief that he was in danger must have been "honestly entertained" in order to entitle him to rely on self-defense, and another instruction that he must have so believed in good faith, were not erroneous, as indicating that the court doubted the defendant's good faith in killing deceased. Matthews v. State, 108 Miss. 72, 66 So. 325, 1914 Miss. LEXIS 170 (Miss. 1914).

There is little practical difference in the meaning of the statutory words "reasonable ground to apprehend" and the phrase "good reason to believe," and use of the one for the other did not render instructions erroneous, as imposing too great a burden of proof on defendant. Matthews v. State, 108 Miss. 72, 66 So. 325, 1914 Miss. LEXIS 170 (Miss. 1914).

Jury should be instructed that if the defendant had reasonable ground to, and did apprehend danger, he might shoot in what he deemed necessary self-defense, and the jury must not hold him to the same cool judgment they were to form, but should put themselves in his place and judge of his acts by the circumstances in which he was situated. Windham v. State, 91 Miss. 845, 45 So. 861, 1907 Miss. LEXIS 200 (Miss. 1907).

Error on a trial for homicide, to charge jury that no words used and directed to any person, or assault made on any person with the fist alone, will justify taking of human life, etc. Taylor v. State, 89 Miss. 671, 42 So. 608, 1906 Miss. LEXIS 65 (Miss. 1906).

33. — —In other cases.

In an armed robbery prosecution arising from the defendant's taking of guns from 2 law enforcement officers, the defendant was not entitled to a jury instruction on self-defense, even though the sum and substance of the defendant's defense was that he took the guns with the purpose of disarming the officers in the midst of what had become a dangerous and heated confrontation in order to extricate himself from harm rather than with the intent to steal, where the jury received no fewer than 5 explanations that the "intent to steal" meant the intent to permanently deprive another of personal property, and therefore a self-defense instruction would have added nothing new to the defendant's theory of the case. Williams v. State, 590 So. 2d 1374, 1991 Miss. LEXIS 801 (Miss. 1991).

In an assault prosecution, in which the defendant slashed the victim across the neck with a knife or a box cutter, the defendant was entitled to an instruction on self-defense where there was evidence that the victim had struck the defendant with an ice pick. Anderson v. State, 571 So. 2d 961, 1990 Miss. LEXIS 717 (Miss. 1990).

A trial court erred in granting a jury instruction prohibiting the jury from considering self-defense as a defense in an aggravated assault prosecution where the defendant testified that he was defending himself and his mother substantiated a critical part of his testimony, even though the chief prosecuting witness, along with the victim and the 2 arresting police officers, provided conflicting testimony. The conflicting evidence constituted a factual dispute for the jury to resolve, not the trial judge; it is for the jury to determine the reasonableness of the ground upon which a defendant acts. Lenard v. State, 552 So. 2d 93, 1989 Miss. LEXIS 467 (Miss. 1989).

Jury instructions indicating that the defendant's verbal abuse of a policeman justified the policeman striking him, and that the defendant was not entitled to the plea of self-defense in assault and battery charges arising out of his severely beating the officer in retaliation, constituted fatal error in that they improperly denied the defendant the plea of self-defense. Ferguson v. State, 242 So. 2d 448, 1970 Miss. LEXIS 1382 (Miss. 1970).

In a prosecution for assault and battery with the intent to kill, the trial court properly refused defendant's instructions which contained inaccurate statements relative to the law of self-defense, and omitted the requirements that the defendant must have been in immediate danger, real or apparent, and that the intent to kill the defendant must have been manifested by some overt act on the part of the victim. Yarber v. State, 230 Miss. 746, 93 So. 2d 851, 1957 Miss. LEXIS 418 (Miss. 1957).

34. —Defense of another.

A murder defendant was entitled to an instruction informing the jury that self-defense may be applicable to the defense of another person where the evidence showed that the deceased had threatened the defendant's girlfriend. Calhoun v. State, 526 So. 2d 531, 1988 Miss. LEXIS 303 (Miss. 1988).

35. —Burden of proof.

Trial court's jury instructions fairly instructed jury as to state's burden of proof, and thus trial court did not commit reversible error by refusing to give defendant's requested jury instruction stating that jury was required to resolve every reasonable doubt in favor of defendant. Williams v. State, 667 So. 2d 15, 1996 Miss. LEXIS 3 (Miss. 1996), overruled in part, Smith v. State, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

In a rape prosecution, the trial court did not err in refusing an instruction which stated that the State was required to present evidence "to produce a moral certainty of guilt"; the phrase "to a moral certainty" is confusing and misleading since the State's burden is to prove the defendant's guilt "beyond a reasonable doubt." Allman v. State, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

In the sentencing phase of a capital case, an instruction stating that in order to return the death penalty the jury was required to find that the mitigating circumstances outweighed the aggravating circumstances, did not improperly shift the burden of proof from the prosecution to the defense. Shell v. State, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

Instruction in grand larceny prosecution that possession or recently stolen property was presumptive proof of defendant's guilt of larceny, and the burden of explaining or accounting for such possession was cast upon the defendant, and when satisfactory explanation was not given, the jury would be warranted in finding him guilty, constituted reversible error. Hall v. State, 279 So. 2d 915, 1973 Miss. LEXIS 1494 (Miss. 1973).

In a homicide prosecution, an instruction that to make a homicide justifiable on the grounds of self-defense, the danger to the slayer must be actual, present and urgent or the slayer must have reasonable grounds to apprehend and in fact apprehend a design on the part of the victim to kill him, or to do him great bodily harm, and in addition there must be imminent danger of such design being accomplished, was not erroneous on the theory that it shifted the burden of proof to the defendant and created confusion. Turner v. State, 220 So. 2d 295, 1969 Miss. LEXIS 1449 (Miss.), cert. denied, 396 U.S. 834, 90 S. Ct. 92, 24 L. Ed. 2d 85, 1969 U.S. LEXIS 930 (U.S. 1969).

In a prosecution of a mother for the death of her son due to a beating, the burden of proving alleged insanity was not placed on accused by an instruction granted to the state that every person under the law is presumed to be sane and responsible for their acts, when that instruction is considered together with the instructions given to the accused as to mental conditions which will relieve one of criminal responsibility. Burr v. State, 237 Miss. 338, 114 So. 2d 764, 1959 Miss. LEXIS 475 (Miss. 1959).

Since even though the killing might have been done in the heat of passion, the defendant would have been guilty of manslaughter, the court did not commit reversible error in refusing defendant's instruction as to the burden of proof which would have permitted the jury to acquit if the killing had been done in the heat of passion; especially where, in view of the instructions granted to defendant, error if any, in refusing the instruction was harmless. Rivers v. State, 245 Miss. 329, 97 So. 2d 236, 1957 Miss. LEXIS 578 (Miss. 1957).

Where the accused's defense to an armed robbery charge was an alibi, the court did not err in failing to give an instruction which would have placed upon the state the burden of proving that the alibi was untrue. Newton v. State, 229 Miss. 267, 90 So. 2d 375, 1956 Miss. LEXIS 606 (Miss. 1956).

Jury held improperly instructed where charged that the burden of proving insanity at the time of the alleged assault rested on the defendant. Williams v. State, 205 Miss. 515, 39 So. 2d 3, 1949 Miss. LEXIS 448 (Miss. 1949).

The burden of proof is never shifted to the defendant to prove his innocence and an instruction to this effect is erroneous. Cumberland v. State, 110 Miss. 521, 70 So. 695, 1915 Miss. LEXIS 77 (Miss. 1915).

It is error to instruct the jury that the burden of proof is on the defendant. Haley v. State, 106 Miss. 358, 63 So. 670, 1913 Miss. LEXIS 142 (Miss. 1913).

36. —Presumptions, generally.

Granting of an instruction, in a prosecution for assault and battery with intent to kill, that malice aforethought might be assumed from the unlawful and deliberate use of a deadly weapon, constituted reversible error since the instruction was on abstract principle of law, no mention was made of the specific facts of the case, and the two different versions of what had occurred and all of the facts surrounding the shooting were in evidence. Allison v. State, 274 So. 2d 678, 1973 Miss. LEXIS 1609 (Miss. 1973).

In a homicide prosecution in which the defendant interposed a defense of insanity, a jury instruction that malice would be implied by law from the nature and character of the weapon used, a gun, and that the deliberate use of a deadly weapon in a difficulty but not in necessary self-defense, is evidence of malice, was reversible error. Coney v. Nolen, 257 So. 2d 855, 1972 Miss. LEXIS 1468 (Miss. 1972).

In a prosecution wherein evidence on behalf of the defendant raised a serious question as to whether the defendant was sane at the time of the alleged crime, it was error to instruct the jury that every person under the law is presumed to be sane and responsible for his acts, since the introduction of such evidence imposed on the state the burden of proving to the jury's satisfaction beyond a reasonable doubt that the defendant was sane, and it was then, after the presumption disappeared, for the jury to determine from the evidence whether or not the state had met its burden. Butler v. State, 245 So. 2d 605, 1971 Miss. LEXIS 1382 (Miss. 1971).

In a prosecution for the offense of receiving stolen goods, it was reversible error for the state to obtain an instruction that if the evidence showed that the goods were found in the defendant's possession, and he gave no satisfactory explanation of such possession, there arose a presumption or inference of fact that the defendant received said goods knowing the same to have been lately taken, stolen and carried away. Mansfield v. State, 231 So. 2d 774, 1970 Miss. LEXIS 1601 (Miss. 1970).

An instruction that malice aforethought may be presumed from the unlawful and deliberate use of a deadly weapon should not have been granted. Barnette v. State, 252 Miss. 652, 173 So. 2d 904, 1965 Miss. LEXIS 1136 (Miss. 1965).

Where all facts and circumstances surrounding homicide are fully disclosed by evidence, it is reversible error for court to instruct that law presumes malice from use of deadly weapon. Dickins v. State, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Law presumes malice from killing of human being with deadly weapon, and this presumption prevails and characterizes homicide as murder unless facts are introduced in evidence changing character of killing and showing either justification or necessity, but unless facts in evidence explain character of killing, presumption stands and state is entitled to instruction announcing this legal principle. Dickins v. State, 208 Miss. 69, 43 So. 2d 366, 1949 Miss. LEXIS 409 (Miss. 1949).

Instruction, in prosecution for assault with intent to kill, that malice aforethought“ may be presumed from the unlawful and deliberate use of a deadly weapon,” was proper in absence of evidence showing justification or necessity for assault. Hughes v. State, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

Instruction in prosecution for assault with intent to kill that malice aforethought “may be presumed from unlawful and deliberate use of a deadly weapon,” was proper where jury was also charged that burden was upon state to prove malice aforethought beyond every reasonable doubt and that defendant intended to kill his victim. Hughes v. State, 207 Miss. 594, 42 So. 2d 805, 1949 Miss. LEXIS 372 (Miss. 1949).

Instruction that possession of property recently stolen is circumstance which may be considered by jury and from which, in absence of reasonable explanation, jury may infer guilt of larceny, is not error when proof shows that the property was stolen; that the property found in possession of accused was the stolen property; that possession was recently after the larceny and that accused’s possession was personal, conscious, exclusive and unexplained by direct or circumstantial evidence which would rebut presumption of taking by accused. Lott v. State, 204 Miss. 610, 37 So. 2d 782, 1948 Miss. LEXIS 394 (Miss. 1948).

Where the defendant was charged with receiving stolen goods, an instruction that certain detailed facts, if shown, gave rise to a presumption that the defendant had knowledge of their being stolen property was fatally erroneous. Pettus v. State, 200 Miss. 397, 27 So. 2d 536, 1946 Miss. LEXIS 302 (Miss. 1946).

When entire case is before a jury, there is no need nor right to charge them upon a presumption. Bridges v. State, 197 Miss. 527, 19 So. 2d 738, 1944 Miss. LEXIS 317 (Miss. 1944).

Instruction in prosecution for receiving stolen property requiring accused to give a satisfactory explanation of his possession of such property in order to be relieved of any inference of guilt is erroneous. Crowell v. State, 195 Miss. 427, 15 So. 2d 508, 1943 Miss. LEXIS 158 (Miss. 1943).

An instruction in which is stated that malice is implied from the use of a deadly weapon although erroneous is not reversible error. Hardy v. State, 143 Miss. 352, 108 So. 727, 1926 Miss. LEXIS 272 (Miss. 1926).

Where the evidence shows all the details of the difficulty it is error to instruct the jury that malice is presumed from the deliberate use of a deadly weapon. Riley v. State, 109 Miss. 286, 68 So. 250, 1915 Miss. LEXIS 150 (Miss. 1915); Cumberland v. State, 110 Miss. 521, 70 So. 695, 1915 Miss. LEXIS 77 (Miss. 1915).

An instruction must not presume, as existing, a disputed fact. Woods v. State, 90 Miss. 245, 43 So. 433, 1907 Miss. LEXIS 57 (Miss. 1907).

37. —Presumption of innocence.

In criminal case, it is not error to refuse instruction that defendant must be presumed innocent until his guilt is fully established by legal and competent evidence, that this presumption prevails through the trial and that the evidence must be reconciled with it. Bone v. State, 207 Miss. 20, 41 So. 2d 347, 1949 Miss. LEXIS 314 (Miss. 1949).

Court did not err in refusing to instruct in trial for grand larceny that presumption of innocence is witness declaring for defendant in thunderous tones that he is innocent and presumption should go into jury room calling upon jury that defendant is innocent until proven guilty beyond every reasonable doubt and to moral certainty. Lott v. State, 204 Miss. 610, 37 So. 2d 782, 1948 Miss. LEXIS 394 (Miss. 1948).

Instructions recognizing the presumption of innocence in favor of the accused and the burden of proof throughout the trial as being upon the state, but warning the jury that such presumption of innocence was intended as a shield and safeguard, but not as a shield from punishment to the guilty, that it was simply a humane provision of the law to guard against the conviction of any innocent person, and that if the jury believed from the evidence beyond a reasonable doubt that the defendant was guilty, they should convict, regardless of the presumption of innocence and regardless of the further fact that the burden of proof was upon the state, did not constitute reversible error. Williams v. State, 14 So. 2d 216 (Miss. 1943).

It is fatal error to refuse an instruction that the defendant is presumed to be innocent. Gentry v. State, 108 Miss. 505, 66 So. 982, 1914 Miss. LEXIS 231 (Miss. 1914).

The defendant is presumed to be innocent and such presumption attends him throughout the trial and a contrary instruction is erroneous. Howell v. State, 98 Miss. 439, 53 So. 954, 1910 Miss. LEXIS 80 (Miss. 1910).

38. —Dying declaration.

In a murder prosecution wherein it appeared that at the time of trial sentiment in the community was hostile to the accused, it was reversible error for the trial judge to refuse to instruct on behalf of the accused that dying declarations are a species of hearsay evidence and are not entitled to the same credit and force as if the deceased was alive and testifying in the presence of the jury, under oath, and subject to cross-examination, and that the jury alone were the judges of the weight and force of such dying declarations. Cannon v. State, 244 Miss. 199, 141 So. 2d 251, 1962 Miss. LEXIS 440 (Miss. 1962).

In a proper case in view of instruction given for the defendant, the court may instruct the jury for the state that it does not intimate the weight the jury should give to a dying declaration but that the jury is the judge of the weight of the evidence. Wilkerson v. State, 134 Miss. 853, 98 So. 770, 1923 Miss. LEXIS 245 (Miss. 1923).

The jury is judge of the weight of a dying declaration as evidence and it is error for the court in an instruction to particularize such evidence and in so doing give undue emphasis thereto. Gurley v. State, 101 Miss. 190, 57 So. 565, 1911 Miss. LEXIS 119 (Miss. 1911).

39. —Punishment.

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. Colosimo v. Senatobia Motor Inn, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in Coleman v. State (Miss. 1979) 378 So. 2d 640. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 649 So. 2d 1256, 1994 Miss. LEXIS 496 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422, 1995 U.S. LEXIS 7828 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73 – the statute under which the defendant pled guilty–defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State,

732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction with respect to the "especially heinous, atrocious or cruel" aggravating circumstance did not constitute harmless error where the jury was instructed as to only 2 aggravating circumstances, the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and there was no way of knowing beyond a reasonable doubt that a jury would have found, had it been so instructed, that "the actual commission of the felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the penalty phase of a capital murder prosecution, the trial court's instruction on the "especially heinous, atrocious or cruel" statutory aggravating circumstance was proper where the court instructed the jury that the term "heinous, atrocious, or cruel" meant "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciouslessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction affirmatively instructing the jurors that they should individually consider the evidence in mitigation; the instructions given were sufficient where the mitigating circumstances portion of the instruction did not contain "unanimous" or "unanimously," only the aggravating circumstances part of the instruction contained those words, and there was no instruction implying or intimating that a juror should await unanimity before considering a mitigating circumstance. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the sentencing phase of capital murder prosecution, an instruction cautioning the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was a proper statement of the law because it did not inform the jury that it was required to disregard in toto sympathy and left the jury the option to vote for or against the death penalty. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, the court properly denied the defendant's requested instruction that the jury "must consider" sympathy and mercy for the defendant, since the instruction was cumulative where another instruction informed the jury that it was required to consider mitigating circumstances if any aggravating circumstances were found to exist. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

In the sentencing phase of a capital murder prosecution, the trial court erred in denying the defendant's instruction which detailed the effect of his habitual offender indictment. The defendant had a right to have the jury told that his prior convictions and sentences would be considered to enhance the punishment if given a life sentence, and to have the jury informed that this enhancement meant life without parole. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

In the sentencing phase of a capital case, a "mercy" instruction stating that a life sentence could be returned regardless of the evidence was not required even though the prosecutor was allowed to elicit promises from the jurors during voir dire that they would return a death sentence if they believed that the aggravating circumstances outweighed the mitigating circumstances. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

Trial court did not err in murder prosecution in granting an instruction advising the jury that should they convict defendant of manslaughter, the court might sentence defendant to the penitentiary to a term not to exceed 20 years. Flanagan v. National Fire Ins. Co., 277 So. 2d 115, 1973 Miss. LEXIS 1407 (Miss. 1973).

There is no statutory authority for an instruction in a murder case that if the jury should find the defendant guilty, it should fix punishment as confinement in the penitentiary for life. Ray v. R. G. Le Tourneau, Inc., 220 So. 2d 837, 1969 Miss. LEXIS 1481 (Miss. 1969).

The court did not err in charging that if the accused unlawfully and forceably ravished the prosecuting witness without her consent, the jury might return a verdict finding him guilty as charged in the indictment, in which case it would be the duty of the court to sentence the accused to death in the gas chamber, or find the accused guilty as charged and fix his punishment at life imprisonment, or find the accused guilty as charged but disagree as to the punishment, in which case the court would sentence the accused to the state penitentiary for life. Drake v. State, 228 Miss. 589, 89 So. 2d 593, 1956 Miss. LEXIS 550 (Miss. 1956).

In instructing the jury in a murder case as to their power over the punishment to be imposed in case of conviction, the court should exercise care to leave the jury to determine for itself, without any intimation from the court what the punishment should be. Mathison v. State, 87 Miss. 739, 40 So. 801 (Miss. 1905).

40. —Miscellaneous.

Under the circumstances, which included contradictory testimony as to defendant's whereabouts following a shooting, testimony from two sergeants that they received tips informing them that defendant had fled the state, the fact that police were unable to find defendant after searching many of the places that he was known to visit, and that defendant failed to provide an independent explanation for why he was hiding under his house on the day of his arrest, there was probative value in considering flight and thus, the trial court did not err by granting the flight jury instruction. Anderson v. State, 1 So. 3d 905, 2008 Miss. App. LEXIS 543 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

Trial court did not commit error when it denied a defendant's alibi instruction because: (1) there was no evidence to warrant such an instruction, as defendant requested the instruction based on the testimony of a witness who never actually saw him during the time that the crime took place; and (2) defendant, having had the opportunity to present evidence and testify during the trial but having instead chosen to remain silent, was not allowed to effectively present new evidence through jury instructions. Roper v. State, 981 So. 2d 1021, 2008 Miss. App. LEXIS 7 (Miss. Ct. App. 2008).

Defendant's conviction for capital murder was proper where the trial court properly refused defendant's proffered jury instruction because he was not entitled to a jury instruction that emphasized the evidence of his peaceful character, Miss. Code Ann. § 99-17-35. However, he was entitled to offer his good character as evidence of the improbability that he had committed the act charged, Miss. R. Evid. 404(a)(1). Brink v. State, 888 So. 2d 437, 2004 Miss. App. LEXIS 559 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129 (U.S. 2005).

Jury instruction stating that "each person present at the time of, or consenting to and encouraging, aiding or assisting in any material manner in the commission of a crime, or knowingly and wilfully doing any act which is an ingredient in the crime, is . . . a principal" did not deem mere knowledge or unknowing assistance sufficient to find one guilty; phrase "knowingly and wilfully" contemplated that accused acted with knowledge and deliberation, and assistance in commission of crime had to be major. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Instruction that flight may be considered as circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

There is two-pronged test for deciding whether flight instruction is appropriate: only unexplained flight merits flight instruction, and flight instructions are to be given only in cases where that circumstance has considerable probative value. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Accused has right to have his defenses presented to the jury in jury instruction, but defense must be supported by evidence, however meager it may be. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Giving instruction on intoxication as defense to crime was proper, even though intoxication was not asserted as a defense, where defendant testified he was both drunk and high at time alleged offense occurred, where from that testimony jury could reasonably infer that defendant was not aware of his actions and did not have requisite intent to commit crime, and especially where jury was fully and fairly instructed by other instructions and, when read as a whole, instructions were proper as to state's burden of proof and elements of applicable crimes. Peterson v. State, 671 So. 2d 647, 1996 Miss. LEXIS 54 (Miss. 1996).

Evidence that defendant and his friends fled scene in victim's taxicab after shooting victim, stole school bus and drove to Chicago, and there attempted to abduct woman and steal her van, was sufficient to warrant flight instruction in capital murder case, despite evidence that defendant had planned to move to Chicago before shooting victim. Holly v. State, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

In a prosecution for sale of cocaine, the trial court committed reversible error by deleting a portion of an alibi instruction stating that the "defendant is not required to establish the truth of the alibi to your satisfaction," since the omitted language was an essential part of the instruction, and the deleted language was not and could not be covered by general instructions on the presumption of innocence. Jackson v. State, 645 So. 2d 921, 1994 Miss. LEXIS 535 (Miss. 1994).

A trial court erred by reading the Fifth Circuit's "Allen Charge" to the jury when the jury indicated that it was deadlocked, since the only instruction that should be given to a deadlocked jury is the "Sharplin Charge." Bolton v. State, 643 So. 2d 942, 1994 Miss. LEXIS 486 (Miss. 1994).

A trial court did not err in refusing a defendant's requested instruction that the issue for the jury to determine was not the defendant's guilt or innocence, but was whether or not the prosecution had met its legal burden of proving guilt beyond a reasonable doubt. The instruction given by the court, which told the jury that the defendant was not required to prove his innocence and that the burden was on the State to prove him guilty beyond a reasonable doubt of the crime charged in the indictment before they could convict, sufficiently instructed the jury on the presumption of the defendant's innocence and the State's burden of proof. Williams v. State, 589 So. 2d 1278, 1991 Miss. LEXIS 803 (Miss. 1991).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

It is better form for the instruction regarding the substantive elements of the offense to be given separately from the form of the verdict instruction; there is a potential for compromise of the jury's perception of a judicial attitude of complete neutrality toward the question of whether a defendant should be found guilty where the instruction combines the elements of the offense with the form of the verdict. Doby v. State, 557 So. 2d 533, 1990 Miss. LEXIS 45 (Miss. 1990).

A requested "jury nullification" instruction was properly denied since a defendant does not have the right to an instruction on that point, even though the jury does have the power to acquit for any reason whatsoever. Rose v. State, 556 So. 2d 728, 1990 Miss. LEXIS 37 (Miss. 1990).

The granting of jury instructions, which did not state the particular county in which the offense occurred, was not error where venue was proven by the testimony of many officers and the defense presented no evidence to rebut that testimony. Rooks v. State, 529 So. 2d 546, 1988 Miss. LEXIS 232 (Miss. 1988).

It was not error for a trial court to grant a jury instruction as to the form of the verdict which gave the jury the alternative of a guilty verdict first followed by the alternative of a not guilty verdict. Lee v. State, 529 So. 2d 181, 1988 Miss. LEXIS 366 (Miss. 1988).

Although the "do not have to actually know" instruction does not have the court's "stamp of approval," the instruction correctly states the law as a statement of the mental condition each juror must have in order to return a guilty verdict. A jury could never know with the absolute certainty of the eyewitness whether a defendant was guilty or not guilty. In order to return a verdict of guilty, each juror must be convinced beyond all reasonable doubt that an accused is guilty; while the law requires this absolutely, it does not require more. Whittington v. State, 523 So. 2d 966, 1988 Miss. LEXIS 75 (Miss.), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323, 1988 U.S. LEXIS 4871 (U.S. 1988).

Where a jury in a criminal case is not instructed that its verdict must be unanimous, then a "single juror instruction" stating that a finding of not guilty should be made if a single juror has a reasonable doubt of the defendant's guilt, is proper. Thus, where a jury deliberated for an extended period of time without the benefit of either instruction, the failure to grant the requested single juror instruction was reversible error. Edlin v. State, 523 So. 2d 42, 1988 Miss. LEXIS 108 (Miss. 1988).

A bailiff's improper communication to the foreman of a deadlocked jury that "the judge said that we had put too much time and work on this case" constituted reversible error. The judge's subsequent charge to the jury that he would let them continue to deliberate did nothing to remove the taint of the previous impermissible message. Furthermore, the fact that the jury deliberated for approximately 3 ½ hours after receiving the bailiff's message did not demonstrate a lack of coercive effect on the jurors since the length of subsequent deliberations alone cannot remove the taint which an improper communication injects into a jury's verdict. Edlin v. State, 523 So. 2d 42, 1988 Miss. LEXIS 108 (Miss. 1988).

Although it is a correct statement of the constitutional principle of "jury nullification," a criminal defendant is not entitled to a jury instruction stating that the jury has a right to acquit a criminal defendant for whatever reason even though the evidence may support a conviction, and that this power is an important part of the constitutional scheme of our criminal law system. Davis v. State, 520 So. 2d 493, 1988 Miss. LEXIS 151 (Miss. 1988).

Defendant's requested instruction to the effect that identity testimony should be scrutinized with extreme care and that no class of testimony is more uncertain or less to be relied upon was a comment upon the weight of the evidence, and the trial judge was correct in refusing to give it. Ragan v. State, 318 So. 2d 879, 1975 Miss. LEXIS 1459 (Miss. 1975).

When the defense is lack of venue, the jury should be instructed to find the defendant not guilty for lack of venue if it finds the venue is in another county or state, since an acquittal solely on the ground of lack of venue will not constitute double jeopardy and by prosecution in the county having venue. Fabian v. State, 284 So. 2d 55, 1973 Miss. LEXIS 1249 (Miss. 1973).

An instruction on an asserted presumption of malice from the use of a deadly weapon is proper only where the testimony failed to establish the circumstances of the use of the weapon; but where the facts have been set forth in the evidence, the question of malice should be left for the consideration of the jury, and the granting of such an instruction would constitute error. Stewart v. State, 226 So. 2d 911, 1969 Miss. LEXIS 1333 (Miss. 1969).

A "falsus in uno, falsus in omnibus" type of instruction is properly refused in a criminal prosecution. Fielder v. State, 235 Miss. 44, 108 So. 2d 590, 1959 Miss. LEXIS 400 (Miss. 1959).

Defendant in a criminal case is entitled to have the jury charged that all twelve jurors must agree before they can return a verdict of guilty, and the refusal of such an instruction is erroneous where the record does not disclose whether the verdict was unanimous. Markham v. State, 209 Miss. 135, 46 So. 2d 88, 1950 Miss. LEXIS 370 (Miss. 1950).

Where the sole defense in a criminal prosecution in insanity, it would be error for the court merely to instruct the jury to bring in a verdict of "not guilty" should they so find the defendant; so to do would negative any duty on the part of the jury to comply with Code 1942, § 2575. State v. Goering, 200 Miss. 585, 28 So. 2d 248, 1946 Miss. LEXIS 328 (Miss. 1946).

Instruction that if the state failed to prove all the material allegations in the indictment, it was the duty of the jury to find defendant not guilty, was properly refused since it furnished the jury with no acceptable standard by which the quality or degree of proof should be measured. Dolan v. State, 195 Miss. 154, 13 So. 2d 925, 1943 Miss. LEXIS 128 (Miss. 1943).

The court is justified in refusing an instruction on "unwritten law." Clark v. State, 102 Miss. 768, 59 So. 887, 1912 Miss. LEXIS 120 (Miss. 1912).

Instructions as to the race or color of the defendant should never be given unless the state invokes a rule for the guidance of the jury which directs attention of the jury to the defendant's color, and then the trial court should sua sponte rebuke the state's representative in the presence of the jury. Clark v. State, 102 Miss. 768, 59 So. 887, 1912 Miss. LEXIS 120 (Miss. 1912).

41. — —Homicide cases.

Jury instruction that "deliberate design" meant "to kill, without authority of law and not being legally justifiable, legally excusable or under circumstances that would reduce the act to a lesser crime" did not improperly state that deliberate design could be formed at very moment of fatal act or improperly cut off defendant's contention that shooting was in self-defense. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Jury instruction in homicide prosecution, that "deliberate design may be presumed from the unlawful and deliberate use of a deadly weapon" was reversible error; facts of shooting were set forth in trial, and while testimony was conflicting, question of malice should have been left for consideration of jury. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Giving of flight instruction was reversible error; defendant was arguing self-defense, and jury heard testimony on defendant's flight, which both defendant and codefendant explained as effort to avoid retribution from homicide victim's friends. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Where only theory of defense in murder prosecution was self-defense and jury was properly instructed thereon, there was no requirement that court instruct as to other possible theories under which jury could have found homicide to have been justifiable, excusable, or manslaughter. Tran v. State, 681 So. 2d 514, 1996 Miss. LEXIS 432 (Miss. 1996).

Defense of accident to homicide charge was inapplicable if defendant, as he alleged, fatally shot victim while attempting to commit suicide, an unlawful act, and thus defendant was not entitled to requested instruction on accident. Nicholson ex rel. Gollott v. State, 672 So. 2d 744, 1996 Miss. LEXIS 146 (Miss. 1996).

Trial court did not mislead jury, in capital murder case involving underlying felony of sexual battery, by instructing that "the fact that the actual moment of the victim's death may have preceded alleged consummation of the underlying felony of Sexual Battery does not void the charge of Capital Murder," even though defendant claimed that jury was misled on intent necessary for capital murder as instruction could be correct statement of law only if jury also found that defendant had formed intent to commit sexual battery; when taken in conjunction with other instructions, jury was clearly informed that it must find defendant intended to kill victim while engaged in commission of sexual battery. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

In homicide cases, trial court should instruct jury about defendant's theories of defense, justification, or excuse that are supported by evidence, no matter how meager or unlikely, and trial court's failure to do so is error requiring reversal of judgment of conviction. Manuel v. State, 667 So. 2d 590, 1995 Miss. LEXIS 591 (Miss. 1995).

A jury instruction in a capital murder prosecution did not violate the due process clause of the 14th Amendment by relieving the State of the burden of proving intent to commit the underlying felonies where the instruction stated that the defendant should be found guilty if he wilfully performed "any act which is an element of the crimes with which he is charged or immediately connected with them or leading to their commission." Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

When an instruction is given on the right to carry a concealed weapon, it should be prefaced with the admonition to the jury that it "should not view as evidence against the defendant that he carried a concealed weapon on his person," because under the law he did have a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack. Duvall v. State, 634 So. 2d 524, 1994 Miss. LEXIS 140 (Miss. 1994).

A murder defendant was not entitled to a Weathersby instruction where the defendant's argument that his version of the facts was not contradicted by any credible evidence was based on his discounting the testimony of an eyewitness because her trial testimony differed from the initial statement she gave police and because of her "substantial bias" as the former wife of the victim, the eyewitness' testimony clearly conflicted with the defendant's version of the facts, and statements made by the defendant after the homicide were not consistent with his testimony at trial. Green v. State, 631 So. 2d 167, 1994 Miss. LEXIS 13 (Miss. 1994).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. Butler v. State, 608 So. 2d 314, 1992 Miss. LEXIS 588 (Miss. 1992).

An instruction correctly instructing the jury regarding the law of capital murder and the jury's duty to follow the law and not "be concerned with the wisdom of any rule of law" was not improper; an instruction that implicitly condemns jury nullification is not error. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

A capital murder defendant was not entitled to a manslaughter instruction based on the defendant's contention that the victim's stabbing death was accidental, where statements regarding an accidental stabbing made by the defendant to a third party shortly after the incident were inconsistent, the autopsy revealed that the stab wound could not have been inflicted under any one of the inconsistent scenarios related by the defendant, and the defendant's scenarios of an accidental stabbing would constitute evidence of innocence of any crime rather than evidence of the crime of manslaughter. Holland v. State, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

A trial court did not err in refusing to grant a lesser included offense instruction for manslaughter in a capital murder prosecution arising from the commission of a murder while engaged in the commission of an armed robbery, since the manslaughter statute explicitly excepts robbery from its provisions. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

There was no evidence of sudden provocation that would warrant the giving of a manslaughter instruction in a prosecution for murder of the defendant's former wife, in spite of the testimony of attorneys who represented the defendant during his divorce proceedings and the testimony of the defendant's family, all of whom noticed a change in the defendant after the divorce, since a long-standing domestic dispute did not constitute grounds for a manslaughter instruction. Graham v. State, 582 So. 2d 1014, 1991 Miss. LEXIS 359 (Miss. 1991).

A trial court properly denied a murder defendant's request for a jury instruction on the lesser included offense of manslaughter where the evidence indicated that there had been a struggle in the victim's home, the defendant knocked the victim unconscious by hitting him with a blunt object with tremendous force, the defendant put the victim's unconscious body into the trunk of the victim's car and drove the car to another county, and the defendant poured gasoline on the victim and burned him to death hours later. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

A defendant who was indicted for murder under § 97-3-19(2)(e) was not entitled to a manslaughter instruction under § 97-3-27, where the victim was beaten to death and the injuries were consistent with injuries inflicted by hands and feet, and therefore no reasonable hypothetical juror could have found that the killing was without malice. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

A murder defendant was not entitled to a manslaughter instruction where the record contained no evidence from which the jury could determine that the killing resulted from heat of passion and was not the result of malice. Wilson v. State, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

A trial court erred in refusing a murder defendant's proffered lesser included offense manslaughter instructions where, taking the evidence in the light most favorable to the defendant, the jury could have found that the defendant lacked the requisite intent of malice aforethought to assist in the murder but that he did participate in kidnapping the victim. Welch v. State, 566 So. 2d 680, 1990 Miss. LEXIS 152 (Miss. 1990).

Evidence in a murder trial was insufficient to support a manslaughter instruction where the defendant did not testify, the only account of the slaying was the defendant's statements to the investigating officer and the testimony of eyewitnesses, there was no gross insult, and the defendant and the victim were not engaged in physical combat, and thus there was no evidence upon which any jury could rationally conclude that the defendant shot the victim as a result of provoked rage. Barnett v. State, 563 So. 2d 1377, 1990 Miss. LEXIS 284 (Miss. 1990).

In a murder prosecution, the trial court's instruction to the jury that they should disregard a remark made in the opening argument for the state, that when violence is being committed daily upon the streets the jury should be careful not to extend sympathy to a person who has committed a crime, was not shown to have been ineffective to cure the harmful effect of the remark, if any. Smith v. State, 245 So. 2d 583, 1971 Miss. LEXIS 1371 (Miss. 1971).

In murder prosecution it is unnecessary and unwise to define malice. Smith v. State, 237 Miss. 626, 114 So. 2d 676, 1959 Miss. LEXIS 513 (Miss. 1959).

An instruction that there is no particular time during which it is necessary that an intent to kill should have existed is inaccurate, since the intent must exist at the time injury was inflicted. Lindley v. State, 234 Miss. 423, 106 So. 2d 684, 1958 Miss. LEXIS 512 (Miss. 1958).

Court did not commit reversible error in refusing the accused's instruction that if he had shot deceased in the lawful defense of his sister-in-law, wife of deceased, the jury should acquit him, in view of insufficient proof that the sister-in-law was in any real or apparent danger of losing her life or sustaining great bodily harm at the hands of the deceased at the time he was shot. Folks v. State, 230 Miss. 217, 92 So. 2d 461, 1957 Miss. LEXIS 361 (Miss. 1957).

Flight is ordinarily relevant as evidence of guilt and a jury in a murder prosecution should not be instructed that it is not evidence of guilt. Wright v. State, 209 Miss. 795, 48 So. 2d 509, 1950 Miss. LEXIS 444 (Miss. 1950).

In murder prosecution, refusal to grant defendant's requested instruction that if jury believed circumstances surrounding defendant at time he made confession were calculated to awaken fear or suspicion against him, that he was ignorant of nature and course of criminal proceedings and was induced by officers to give confession, jury should consider such facts in determining guilt, was not error for reason that requested instruction did not give correct test and court granted defendant instruction that if jury believed alleged confession was brought about by fear, duress, intimidation, or that it was untrue, jury should disregard it. Pulliam v. State, 45 So. 2d 578 (Miss. 1950).

It is not error to grant to state manslaughter instruction, where under all of evidence accused cannot be properly convicted of greater offense than manslaughter and even that offense is not satisfactorily proved beyond every reasonable doubt, as against accused's contention he was either guilty of murder or was justified in committing homicide in necessary self-defense. Leflore v. State, 44 So. 2d 393 (Miss. 1950).

42. — —Assault cases.

In a prosecution for aggravated assault, the trial court erred in giving a "flight instruction" where there was an explanation for the defendant's flight implicit in the defense of the case-the defendant's claim of self-defense-and there was ample reason for the defendant to have left the scene of the hostilities based on threats from a third person and the alleged danger from the victim. Banks v. State, 631 So. 2d 748, 1994 Miss. LEXIS 9 (Miss. 1994).

Where an assault defendant is arguing self-defense, a flight instruction should be automatically ruled out and found to be of no probative value; a flight instruction would have particular prejudicial effect in a case where self-defense is claimed because to suggest and highlight, through the sanction of a court-granted instruction, that the defendant's flight was possibly an indication of guilt suggests that the court does not accept the self-defense argument. Banks v. State, 631 So. 2d 748, 1994 Miss. LEXIS 9 (Miss. 1994).

In a prosecution for aggravated assault under § 97-3-7(2), the defendant may not have the jury instructed on the lesser offense of simple assault under § 97-3-7(1) where the defendant wielded what was indisputably a deadly weapon and intentionally struck the victim, even if the injury inflicted was relatively slight. Hutchinson v. State, 594 So. 2d 17, 1992 Miss. LEXIS 45 (Miss. 1992).

In a prosecution for aggravated assault, the trial court erred in refusing to give a lesser included offense instruction on simple assault where the evidence could have brought the case within the statutory definition of simple assault, even though some of the evidence was contradicted and the jury was not required to believe any of the testimony presented; as long as the evidence "muddies the water enough," the defendant is entitled to the lesser included offense instruction. Robinson v. State, 571 So. 2d 275, 1990 Miss. LEXIS 720 (Miss. 1990).

In prosecution of father and son for assault with intent to kill, an instruction directing the jury that if they believed the son guilty beyond a reasonable doubt as charged and that the father was aiding and abetting therein and commanding those present to stand back during the assault, was erroneous as permitting the jury to believe that commanding the others to stand back was sufficient to constitute guilt. Burnett v. State, 192 Miss. 44, 4 So. 2d 541, 1941 Miss. LEXIS 13 (Miss. 1941).

43. — —Larceny, robbery, burglary, or stolen property cases.

Defendant's conviction for armed robbery was proper because his argument that a jury instruction spoke to the weight of the evidence and implied that a gun was unimportant to the state's case was without merit; the jury was presented with direct, uncontradicted testimony from the bank teller that the robber had a gun during the robbery and defendant had actually admitted that he committed the robbery. Hancock v. State, 964 So. 2d 1167, 2007 Miss. App. LEXIS 35 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 526 (Miss. 2007).

In a prosecution for burglary of an inhabited dwelling, the defendant was not entitled to a lesser included offense instruction on the charge of simple assault where the evidence sufficiently supported a jury determination of the burglary charge, since simple assault is not a constituent offense of burglary of a dwelling. Ross v. State, 603 So. 2d 857, 1992 Miss. LEXIS 381 (Miss. 1992).

In a prosecution for grand larceny for theft of an automobile, the trial court correctly refused an instruction on the lesser included offense of trespass where the defendant did not claim that he was joyriding or that he was using the vehicle for a brief period and expected to return it, but rather, his defense was an alibi that he was not present when the automobile was stolen. Deal v. State, 589 So. 2d 1257, 1991 Miss. LEXIS 800 (Miss. 1991).

A defendant in a burglary prosecution was entitled to an instruction on the lesser included offense of trespass where the person who lived in the house in question testified that the first time the defendant entered her house he did so without her knowledge or consent and she only discovered him as he came out of her bathroom, and that the second time he entered the house he kicked in the door after she closed the door and locked him out when she went to get some money the defendant claimed he had left inside the house, and another witness testified that the person who lived in the house voluntarily let the defendant in the first time. Robinson v. State, 589 So. 2d 116, 1991 Miss. LEXIS 766 (Miss. 1991).

In an armed robbery prosecution, an instruction that a double-barreled shotgun, marked as an exhibit, had not been introduced into evidence and should not be considered on the question of the defendant's guilt, was properly refused where two witnesses had identified the gun as the one used by the defendant in the robbery and the defendant had made no effort to discredit the witnesses' testimony as to the gun. Wilcox v. State, 241 So. 2d 665, 1970 Miss. LEXIS 1356 (Miss. 1970).

In a prosecution for larceny in which guilty intent is an element and in which the defense was that accused was too drunk to know what he was doing, it is error to charge that voluntary intoxication is no defense. Best v. State, 235 Miss. 318, 108 So. 2d 840, 1959 Miss. LEXIS 431 (Miss. 1959).

In a prosecution for receiving stolen property, a requested instruction that the persons from whom it was received are subject to prosecution for grand larceny is properly refused. Fielder v. State, 235 Miss. 44, 108 So. 2d 590, 1959 Miss. LEXIS 400 (Miss. 1959).

In a robbery prosecution of a member of the Negro race, the trial court committed reversible error in failing to instruct the jury to disregard a statement by the district attorney in his argument that "if you don't stop them now, they will next be robbing white people." Reed v. State, 232 Miss. 432, 99 So. 2d 455, 1958 Miss. LEXIS 290 (Miss. 1958).

On prosecution for grand larceny, court did not err in refusing to instruct jury that if there is any material fact or circumstances proven by evidence upon which jury can place reasonable construction favorable either to the state or to defendant, it is duty of jury to accept that construction favorable to defendant, although one favorable to state is more reasonable. Lott v. State, 204 Miss. 610, 37 So. 2d 782, 1948 Miss. LEXIS 394 (Miss. 1948).

44. — —Other cases.

Court rejected defendant's claim that she established a standard entrapment claim; defendant knew where to find cocaine and had asked the confidential informant to set aside some cocaine for her after the sale, there was no evidence that she was fearful or reluctant to participate on the day of the sale, and defendant was not excused from buying or selling cocaine simply because the informant asked her to do so. The jury, after receiving the entrapment defense instruction, clearly believed defendant was predisposed to commit both crimes of sale of cocaine and possession of cocaine. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Jury instruction stating that where person is occupying and exercising control over automobile, he is presumed to be in possession of contents (i.e., drugs found therein) of automobile, was, standing alone, incorrect statement of law concerning constructive possession, for purposes of prosecution for possession of methamphetamine; however, coupled with instruction that spoke to "conscious control" over illegal substance, there was no error looking at jury instructions as whole. (Per Smith, J., with a Presiding Justice and one Justice concurring, two Justices concurring in result only, and a Presiding Justice concurring and joining in separate concurrence. Townsend v. State, 681 So. 2d 497, 1996 Miss. LEXIS 414 (Miss. 1996).

In an appeal from a conviction of perjury, the fact that the jury's guilty verdict can be supported by the evidence does not automatically excuse the trial court's failure to give an instruction on the "two witness" rule required in perjury cases. Hale v. State, 648 So. 2d 531, 1994 Miss. LEXIS 626 (Miss. 1994).

In a prosecution for perjury, the "two witness" instruction should be given even if the defendant fails to request it. Hale v. State, 648 So. 2d 531, 1994 Miss. LEXIS 626 (Miss. 1994).

In a prosecution for perjury, the trial court's failure to instruct the jury in accordance with the "two witness" rule as required in perjury cases constituted reversible error where one specific witness or piece of documentary evidence could not be singled out as having been sufficient to convict the defendant of perjury. Hale v. State, 648 So. 2d 531, 1994 Miss. LEXIS 626 (Miss. 1994).

In a rape prosecution arising from the rape of the defendant's 13-year-old daughter, "flight" instructions were properly given, in spite of the defendant's argument that he explained his flight by testifying that he was "shocked," "confused," and "frightened" after being confronted by his wife about his daughter's allegation, where the defendant's uncorroborated explanation was contradicted by the wife who testified that the defendant admitted to her via telephone that he had sex with the daughter. Evans v. State, 579 So. 2d 1246, 1991 Miss. LEXIS 255 (Miss. 1991).

In a prosecution for rape, the evidence was sufficient to support an instruction on the charge of aggravated assault where the victim testified that the defendant had repeatedly punched her in the face and head during his attack on her, she further testified that she had spent about 4 days in the hospital and that she was told to see a neurologist because of a damaged nerve in her head, the emergency room physician testified that the victim had suffered significant facial trauma and that both of her eyes were swollen shut, the victim had fresh blood in both nostrils and significant bruising and bleeding into the skin of her face, and photographs of the victim taken after the attack illustrated the nature of her injuries. The evidence was also sufficient to support an instruction on the lesser included offense of simple assault where the defendant transported the victim to the hospital after the attack. Taylor v. State, 577 So. 2d 381, 1991 Miss. LEXIS 120 (Miss. 1991).

In a rape prosecution, the trial court properly denied an instruction which stated that the defendant could not be convicted upon the uncorroborated testimony of the prosecutrix since it was an incorrect statement of the law in that it instructed the jury that corroboration of the victim's testimony was necessary. Allman v. State, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

In deciding whether lesser included offense instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. However, even where there is a great disparity in maximum punishments between the offenses, the trial judge cannot indiscriminately give a lesser included offense instruction, nor can the trial judge give such an instruction on the basis of pure speculation; there must be some evidence regarding the lesser included offense. Thus, a rape defendant was entitled to instructions on the lesser included offenses of simple and aggravated assault where the defendant's side of the story warranted the instructions, particularly since the maximum penalty for simple assault carries a 6-month jail term in the county jail and a $500 fine and the maximum penalty for aggravated assault carries a 20-year prison term in the penitentiary, while, if convicted for rape, the defendant would be faced with the possibility of serving a prison term for the remainder of his life. Boyd v. State, 557 So. 2d 1178, 1989 Miss. LEXIS 461 (Miss. 1989).

The failure to flee is a circumstance indicative of nothing, and is as consistent with guilt as innocence. Thus, a trial court did not err in refusing to grant a reverse flight instruction where the record did not support the defendant's contention that nonflight had considerable probative value of guilt or innocence. Dennis v. State, 555 So. 2d 679, 1989 Miss. LEXIS 465 (Miss. 1989).

A defendant accused of selling marijuana was entitled to have an entrapment instruction submitted to the jury based on his testimony that he had never made a sale of marijuana before, that he had no plans, intent or disposition to make such a sale, and that, had it not been for the importuning of the Bureau of Narcotics confidential informant, he would not have done so. King v. State, 530 So. 2d 1356, 1988 Miss. LEXIS 419 (Miss. 1988).

Where the defendant was on trial charged with mayhem under provisions of Code 1942, § 2283, an instruction for the prosecution which used the words "deliberate design" rather than the statutory words, "premeditated design", did not constitute error, for deliberate is a synonym for premeditated. Emily v. State, 191 So. 2d 925, 1966 Miss. LEXIS 1234 (Miss. 1966).

There was no error in an instruction which followed Code 1942, § 2412.5 and told the jury that it could find defendant guilty if he, at the time and place testified to, entered upon the property of another and peeped through the window of the dwelling house of a named person for the lewd, licentious and indecent purpose of spying upon the occupants thereof. Brown v. State, 244 Miss. 78, 140 So. 2d 565, 1962 Miss. LEXIS 426 (Miss. 1962).

Since evidence that after the commission of the crime of seduction the accused and the prosecutrix had lived together as man and wife for a number of months informed the jury that subsequent acts of intercourse had been committed, the trial court did not commit prejudicial error in refusing to instruct that if the jury believed that after the alleged crime had occurred, the prosecutrix continued to have intercourse with the accused, such acts would not affect the guilt of the accused and might be considered by the jury as bearing upon the previous chaste character of the prosecutrix. Aldridge v. State, 232 Miss. 368, 99 So. 2d 456, 1958 Miss. LEXIS 283 (Miss. 1958).

In prosecution under Mississippi Bad Check Law, Code 1942, § 2153, granting of instruction that state has made prima facie case of intent to defraud payee if check is presented to bank on which it was drawn within thirty days after delivery and there is insufficient funds in bank in maker's name to pay check is error, where all facts are in evidence and sharp issue between prosecution and defense is drawn. Moore v. State, 205 Miss. 151, 38 So. 2d 693, 1949 Miss. LEXIS 421 (Miss. 1949).

Instruction, if jury believed defendant sold liquor, "as testified to by state's witness," to find defendant guilty, held not prejudicial. Maxey v. State, 158 Miss. 444, 130 So. 692, 1930 Miss. LEXIS 77 (Miss. 1930).

45. Review.

Supreme Court does not review jury instructions in isolation. Hoops v. State, 681 So. 2d 521, 1996 Miss. LEXIS 433 (Miss. 1996).

Defendant convicted of possessing methamphetamine waived appellate review of his claim that trial court erred by refusing his instruction which correctly spoke to jury's need to find that defendant was "beyond a reasonable doubt," "aware of the presence and character of the particular substance * * * and was intentionally and consciously in possession of it"; defense counsel refused to delete portions of that proposed instruction that trial court found offending and superfluous, and defendant, without objection, refused to submit amended version upon trial court's request. Townsend v. State, 681 So. 2d 497, 1996 Miss. LEXIS 414 (Miss. 1996).

Error could not be predicated on a trial court's refusal of defense instructions where the reviewing court was not provided with a trial transcript of what transpired when the instructions were presented to the trial court; it is the duty of the appellant to see that the record of trial proceedings wherein error is claimed is brought before the reviewing court. Smith v. State, 572 So. 2d 847, 1990 Miss. LEXIS 664 (Miss. 1990).

When defendant who has failed to renew his motion for directed verdict at conclusion of all evidence makes motion for new trial and assigns as ground that verdict of jury is not supported by evidence but is contrary to both law and evidence and proof fails to disclose existence of essential element of crime charged, supreme court will reverse conviction and remand case for new trial on ground that verdict is against great weight of evidence rather than reverse case and render judgment, because of failure of defendant to request directed verdict at close of all the evidence. Smith v. State, 205 Miss. 170, 38 So. 2d 698, 1949 Miss. LEXIS 423 (Miss. 1949).

The court's failure to give an unrequested instruction is not ground for complaint on appeal. Grady v. State, 144 Miss. 778, 110 So. 225, 1926 Miss. LEXIS 392 (Miss. 1926).

The supreme court will not reverse a case merely because of erroneous instructions, unless the party complaining is prejudiced thereby. Hampton v. State, 132 Miss. 154, 96 So. 165, 1923 Miss. LEXIS 43 (Miss. 1923).

An assignment predicating error on the modification of an instruction will not be considered unless the record shows the modification. Hardaway v. State, 128 Miss. 722, 91 So. 418, 1922 Miss. LEXIS 158 (Miss. 1922).

RESEARCH REFERENCES

ALR.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 A.L.R.2d 769.

Indoctrination by court of persons summoned for jury service. 89 A.L.R.2d 197.

Propriety of reference, in instruction in criminal case, to juror's duty to God. 39 A.L.R.3d 1445.

Duty of court, in absence of specific request, to instruct on subject of alibi. 72 A.L.R.3d 547.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses. 72 A.L.R.3d 617.

Instructions to jury: Sympathy to accused as appropriate factor in jury consideration. 72 A.L.R.3d 842.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge)–modern cases. 97 A.L.R.3d 96.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 A.L.R.4th 118.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 A.L.R.4th 983.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial. 31 A.L.R.4th 676.

Instructions to jury as to credibility of child's testimony in criminal case. 32 A.L.R.4th 1196.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial–state cases. 36 A.L.R.4th 1046.

Lesser-related state offense instructions: modern status. 50 A.L.R.4th 1081.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner. 70 A.L.R.4th 132.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal. 81 A.L.R.4th 659.

Propriety and prejudicial effect of federal judge's expressing to jury his opinion as to defendant's guilt in criminal case. 7 A.L.R. Fed. 377.

Modern status of rule that court may instruct dissenting jurors in federal criminal case to give due consideration to opinion of majority (Allen charge). 44 A.L.R. Fed. 468.

When does trial court's noncompliance with requirement of Rule 30, Federal Rules of Criminal Procedure, that opportunity shall be given to make objection to instructions upon request, out of presence of jury, constitute prejudicial error. 55 A.L.R. Fed. 726.

Propriety, in federal criminal trial, of including in jury instruction statement disparaging defendants' credibility. 59 A.L.R. Fed. 514.

Am. Jur.

75A Am. Jur. 2d, Trial §§ 920 et seq.

23A Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 138 et seq. (instructions and admonitions to jury).

CJS.

88 C.J.S., Trial §§ 573, 574 et seq.

Practice References.

Douthwaite and Eades, Jury Instructions For Personal Injury and Tort Cases (Michie).

Ronald W. Eades, Jury Instructions in Automobile Actions (Michie).

Ronald W. Eades, Jury Instructions in Commercial Litigation (Michie).

Ronald W. Eades, Jury Instructions on Damages in Tort Actions, Fifth Edition (Michie).

Ronald W. Eades, Jury Instructions on Medical Issues, 6th Edition (Michie).

Michie's Jury Instructions on CD-ROM (Michie).

§ 99-17-37. Papers may be carried out by jury.

All papers read in evidence on the trial of any cause may be carried from the bar by the jury.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1(80); 1857, ch. 61, art. 157; 1871, § 639; 1880, § 1712; 1892, § 730; 1906, § 791; Hemingway's 1917, § 575; 1930, § 584; 1942, § 1528.

Cross References — Jury may take evidence to jury room in civil actions, see § 11-7-151.

Jury taking evidence into the jury room, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 3.10.

JUDICIAL DECISIONS

1. In general.

The rule that all papers and exhibits which have been received in evidence may be taken to the jury room during deliberation is, within reason, mandatory; the trial court would have discretion to withhold exhibits that might be dangerous or prone to destruction. Thus, a trial court erred when it refused to allow a tape recording of a drug transaction made by the State and introduced into evidence to go to the jury during deliberations. However, the error was harmless where the tape recording was of poor quality, and the jury heard it once in its entirety and then heard certain parts of the recording a second time. Pettit v. State, 569 So. 2d 678, 1990 Miss. LEXIS 627 (Miss. 1990).

Confession entered into evidence properly submitted to jury and carried into jury room pursuant to statute. Coulter v. State, 506 So. 2d 282, 1987 Miss. LEXIS 2476 (Miss. 1987).

Since an indictment can be read to a jury, it would not be prejudicial to the defendant for the indictment to be carried into the jury room. Wood v. State, 275 So. 2d 87, 1973 Miss. LEXIS 1343 (Miss. 1973).

Trial court did not err in permitting jury to carry indictment into the jury room, and it was not prejudicial on grounds that since the indictment was amended to charge manslaughter instead of murder, it was done by interlining through certain words in a manner which left it still clear to the jury that the grand jury had indicted defendant for murder, and someone was having mercy upon him in trying him for a lesser crime, where the court had instructed the jury that the fact that defendant had been indicted was not evidence of the facts charged in the indictment and should not be considered as evidence of his guilt. Wood v. State, 275 So. 2d 87, 1973 Miss. LEXIS 1343 (Miss. 1973).

Where map was paper read in evidence in arson prosecution, permitting jury to take map to jury room when they retire to consider verdict held not error. Whittaker v. State, 169 Miss. 517, 142 So. 474, 1932 Miss. LEXIS 4 (Miss. 1932).

The court should not cause to be withheld from the jury any papers read in evidence on the trial. Lipscomb v. State, 75 Miss. 559, 23 So. 210, 1897 Miss. LEXIS 144 (Miss. 1897).

RESEARCH REFERENCES

ALR.

Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case. 37 A.L.R.3d 238.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases. 35 A.L.R.4th 626.

Am. Jur.
75A Am. Jur. 2d, Trial §§ 1425, 1426 et seq.

CJS.
89 C.J.S., Trial §§ 965, 969, 967 et seq.

§ 99-17-39. Bills of exceptions; duty of judge to sign.

On the trial of prosecutions for any crime or misdemeanor, it shall be the duty of the judge to sign any bill of exceptions tendered by the defendant during the progress thereof, if the truth of the case be fairly stated therein, and the said exceptions shall be a part of the record of such prosecution.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1(145); 1857, ch. 61, art. 163; 1871, § 645; 1880, § 1716; 1892, § 734; 1906, § 795; Hemingway's 1917, § 579; 1930, § 588; 1942, § 1532.

Cross References — Reserving exceptions in trial attended by court reporter, see § 9-13-31.

When bills of exceptions to be tendered, and process if judge is incapacitated and can't sign the bill of exceptions, see § 99-17-41.

Attorneys may sign bills of exceptions if judge refuses, see § 99-17-43.

JUDICIAL DECISIONS

1. In general.

Defendant's contention that the district attorney had committed reversible error by referring to another case involving defendant would not be considered on appeal from a murder conviction, where the remark complained of did not appear in the record and where the record reflected only a motion for a bill of exceptions, but no such bill of exceptions appeared in the record. Coley v. State, 378 So. 2d 1095, 1980 Miss. LEXIS 1840 (Miss. 1980).

Where appellant accepted and filed the bill of exceptions as modified by the trial judge, he was bound by its contents and waived any matters not included in it, and he was precluded from relying upon the second bill of exceptions, signed by two attorneys, in which he sought to bring forward certain matters which had been stricken from the original bill by the trial judge. Edmond v. State, 312 So. 2d 702, 1975 Miss. LEXIS 1653 (Miss. 1975).

Where the bill of exceptions to rulings allegedly made during a sanity trial in connection with a criminal prosecution was both imperfect and insufficient, the trial judge did not err in overruling it. Wilson v. State, 243 Miss. 859, 140 So. 2d 275, 1962 Miss. LEXIS 413 (Miss. 1962).

The object of a bill of exceptions is to put of record occurrences at the trial which are not of record otherwise. Holmes v. State, 242 Miss. 407, 134 So. 2d 485, 1961 Miss. LEXIS 576 (Miss. 1961).

Supreme court will not, on appeal from murder conviction, consider objection to remarks made by district attorney in his argument to jury, when no objection was offered to remarks at the time they were made, no bill of exceptions was taken, no motion for mistrial was asked by defendant, and trial judge was not asked for ruling. Woods v. State, 37 So. 2d 319 (Miss. 1948).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review § 447.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 701 et seq. (bill of exception and other similar devices).

6 Am. Jur. Trials, Making and Preserving the Record-Objections, § 31.

CJS.

4 C.J.S., Appeal and Error §§ 576 et seq.

§ 99-17-41. Bills of exceptions; when tendered and signed; incapacity of judge.

Bills of exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and signed during the trial, or during the term of the court, and bills of exceptions to judgments overruling motions for new trials must be presented to the judge for his signature during the term or within ten days, or such further time, not exceeding sixty days, as the court may allow, after the end of the term, and must be signed promptly by him if found to be correct. If the death, resignation, or other incapacity of the judge shall prevent him from signing a bill of exceptions, the affidavit of the attorney of record who represented the party tendering the bill of exceptions, and of all of them if more than one, that it correctly states the facts and rulings of the court, shall be received as a substitute for the signature of the judge to it; but in such case, if the state shall file in the supreme court an affidavit that the bill of exceptions is not correct, stating particularly wherein it is not correct, the state may then file any affidavits touching the matter, and the defendant may likewise file any affidavits other than his own up to the time of the call of the case for trial in the supreme court; and said court shall consider and determine, on submission of the case, both as to the truth of the bill of exceptions and the questions involved in what the court may determine to be the bill of exceptions.

HISTORY: Codes, 1880, § 1718; 1892, § 735; 1906, § 796; Hemingway's 1917, § 580; 1930, § 589; 1942, § 1533.

Cross References — Reserving exceptions in trial attended by court reporter, see § 9-13-31.

Duty of judge to sign bills of exceptions, see § 99-17-39.

Attorneys may sign bills of exceptions if judge refuses, see § 99-17-43.

JUDICIAL DECISIONS

1. In general.

An affidavit of counsel as to what occurred on a certain date with respect to objection to alleged improper argument of prosecuting attorney, which was not in the record of the trial but appended to appellant's brief, could not be considered as part of the record. Thompson v. State, 220 Miss. 200, 70 So. 2d 341, 1954 Miss. LEXIS 426 (Miss. 1954).

Alleged improper argument in a criminal case by the prosecuting attorney will not be considered on appeal unless objected to on the trial and a special bill of exceptions be taken and signed during the term. Powers v. State, 83 Miss. 691, 36 So. 6, 1903 Miss. LEXIS 90 (Miss. 1903), overruled, Jones v. State, 144 Miss. 52, 109 So. 265, 1926 Miss. LEXIS 341 (Miss. 1926).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review § 447.

6 Am. Jur. Trials, Making and Preserving the Record-Objections, § 31.

CJS.

4 C.J.S., Appeal and Error §§ 581, 586.

§ 99-17-43. Bills of exceptions; attorneys may sign if judge refuses.

If the judge shall refuse to sign a bill of exceptions to an opinion, decision, or charge given or made on the trial of any cause or motion, when the bill of exceptions is tendered to him, it shall be lawful for two attorneys at law who may be present at the time of the giving or making of such opinion, decision, or charge, and of the refusal of the judge to sign such bill of exceptions, to sign the same; and the bill of exceptions so signed shall have the same force and effect as if it had been signed by the judge.

HISTORY: Codes, 1857, ch. 61, art. 164; 1871, § 646; 1880, § 1717; 1892, § 737; 1906, § 798; Hemingway's 1917, § 586; 1930, § 590; 1942, § 1534.

Cross References — Reserving exceptions in trial attended by court reporter, see § 9-13-31.

Duty of judge to sign bill of exceptions, see § 99-17-39.

Substitution for judge's signature in the event judge is unable to sign the bill of exceptions, see § 99-17-41.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sufficiency of signing.

1. In general.

In a prosecution for murder, Defendant's contention that the district attorney had committed reversible error by referring to another case involving defendant would not be considered on appeal from a murder conviction, where the remark complained of did not appear in the record and where the record reflected only a motion for a bill of exceptions, but no such bill of exceptions appeared in the record. Coley v. State, 378 So. 2d 1095, 1980 Miss. LEXIS 1840 (Miss. 1980).

Where appellant accepted and filed the bill of exceptions as modified by the trial judge, he was bound by its contents and waived any matters not included in it, and he was precluded from relying upon the second bill of exceptions, signed by two attorneys, in which he sought to bring forward certain matters which had been stricken from the original bill by the trial judge. Edmond v. State, 312 So. 2d 702, 1975 Miss. LEXIS 1653 (Miss. 1975).

If in fact the bill of exceptions to ruling allegedly made during the sanity trial in connection with a criminal prosecution stated the truth of the matter, a way was open to the appellant to make it available, even though the judge did not sign it. Wilson v. State, 243 Miss. 859, 140 So. 2d 275, 1962 Miss. LEXIS 413 (Miss. 1962).

The statute provides the only remedy where the judge refuses to sign. Tatum v.

State, 176 Miss. 571, 169 So. 841, 1936 Miss. LEXIS 154 (Miss. 1936).

Court cannot aid counsel, unable because of circumstances to secure required signature of two attorneys to bill of exceptions, which judge refused to sign, in absence of statutory authority. Fairley v. State, 152 Miss. 656, 120 So. 747, 1929 Miss. LEXIS 238 (Miss. 1929).

The statute is constitutional. Van Buren v. State, 24 Miss. 512, 1852 Miss. LEXIS 93 (Miss. 1852).

2. Sufficiency of signing.

Where the bill of exceptions signed by two attorneys contained no averment or allegation that the trial judge refused to sign the bill as tendered, this section did not become available to or operative in favor of the appellant. Edmond v. State, 312 So. 2d 702, 1975 Miss. LEXIS 1653 (Miss. 1975).

Bill of exceptions not signed by trial judge or by two attorneys other than those representing defendant could not be considered. Smith v. State, 158 Miss. 355, 128 So. 891, 1930 Miss. LEXIS 12 (Miss. 1930).

Bill of exceptions which trial judge refused to sign could not be perfected by signature of attorneys representing defendant. Pittman v. State, 155 Miss. 745, 124 So. 761, 1929 Miss. LEXIS 327 (Miss. 1929).

Bill of exceptions to district attorney's argument never became part of record, where not signed by attorneys present when judge refused to sign it. Fairley v. State, 152 Miss. 656, 120 So. 747, 1929 Miss. LEXIS 238 (Miss. 1929).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review § 447.

CJS.

4 C.J.S., Appeal and Error § 581.

§ 99-17-45. Bills of exception; amendment.

Bills of exception, with the approval of the trial judge, may be amended at any time before the hearing on appeal, for the purpose of curing omissions, defects, or inaccuracy; but no such amendment shall be made until the parties interested shall have been given five days' notice of such proposed amendment.

HISTORY: Codes, 1806, § 799; Hemingway's 1917, § 587; 1930, § 591; 1942, § 1535.

Cross References — Amendment of bills of exceptions in civil actions, see § 11-7-211.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Illustrative cases.

1. In general.

A proposed amendment to a bill of exceptions which gave some support to the defendant's allegation that he had requested, and been denied, a preliminary examination, was not properly a part of the record in the case, where the amendment had not been approved or consented to by the trial court. Stevenson v. State, 244 So. 2d 30, 1971 Miss. LEXIS 1324 (Miss. 1971).

The trial court may amend a special bill of exceptions before the expiration of the term of court. Archer v. State, 140 Miss. 597, 105 So. 747, 1925 Miss. LEXIS 295 (Miss. 1925).

2. Illustrative cases.

The appellant was entitled to be given leave to amend his bill of exceptions to cure the defects so that his appeal could proceed, notwithstanding that he could have amended or made motion to amend his bill of exceptions from the time that the appellee filed its motion to dismiss until the hearing on that motion over nine months later, because there had been no hearing on the merits of the appeal. Triplett v. Mayor of Vicksburg, 758 So. 2d 399, 2000 Miss. LEXIS 28 (Miss. 2000).

RESEARCH REFERENCES

Am. Jur.
5 Am. Jur. 2d, Appellate Review § 447.

CJS.
4 C.J.S., Appeal and Error §§ 591 et seq.

§ 99-17-47. New trials; terms directed by court; number limited.

Every new trial granted shall be on such terms as the court shall direct. No more than two new trials shall be granted to the same party in any cause.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1(73); 1857, ch. 61, art. 165; 1871, § 647; 1880, § 1719; 1892, § 738; 1906, § 800; Hemingway's 1917, § 588; 1930, § 592; 1942, § 1536; Laws, 1956, ch. 230.

Cross References — New trials, see MRCrP 25.1 through 25.4.

JUDICIAL DECISIONS

ANALYSIS

1. Power and duty of court generally.
2. Grounds for new trial.
3. —As warranting directed verdict.
4. Limitation on number of new trials.

1. Power and duty of court generally.

Presumption of vindictiveness which violates constitutional requirement of due process of law, which applies when accused has received increased sentence upon retrial after having successfully attacked initial conviction on criminal charge, does not apply where accused's guilty plea has been set aside as invalid and sentence imposed after trial is greater than that which had been previously imposed after guilty plea, because increase in sentence is not more likely than not attributable to vindictiveness on part of sentencing judge. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865, 1989 U.S. LEXIS 2839 (U.S. 1989).

Where the case has been reversed and remanded for a new trial, a trial de novo follows. The trial court hears the case as if for the first time and considers all matters as though there had been no prior trial. As a general rule, when the court reverses and remands, the case is to be tried de novo on all issues. West v. State, 519 So. 2d 418, 1988 Miss. LEXIS 17 (Miss. 1988).

Where a criminal case has been reversed and remanded for a new trial, a trial de novo follows; the trial court hears the case as if for the first time and considers all matters as if there had been no prior trial. West v. State, 519 So. 2d 418, 1988 Miss. LEXIS 17 (Miss. 1988).

Trial or appellate court is rarely justified in setting up its judgment against that of the jury on an issue of fact, but should do so in a proper case. Conway v. State, 177 Miss. 461, 171 So. 16, 1936 Miss. LEXIS 270 (Miss. 1936).

2. Grounds for new trial.

In a murder case, in view of evidence that (1) defendant and his girlfriend were seen together about 1 ½ hours before her body was found in defendant's truck; (2) the truck was found minutes after defendant reported it stolen by his girlfriend; (3) a bullet in the victim's head came from a .38 caliber gun, and such a gun was recovered from defendant's home; and (4) there were similarities between the bullet recovered from the victim's body and bullets fired from the recovered gun, the trial court properly denied defendant's motion for a new trial. Rinehart v. State, 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Victim's father testified that he had paid between $ 3,000 and $ 4,000 for the truck rims; although this was not direct testimony as to the value of the rims, it circumstantially provided a basis for the jury to infer that the rims were worth at least $ 250; defendant's conviction for attempt to commit grand larceny was therefore appropriate and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. Smith v. State, 881 So. 2d 908, 2004 Miss. App. LEXIS 401 (Miss. Ct. App. 2004).

A defendant who was convicted of the sale of cocaine was entitled to a new trial where a confidential informant had told the defendant that the informant owed a third party some money, that he could not go with his "cousin" (an undercover narcotics agent) to get some cocaine, but he would give the defendant $5 if he would go get it "for him and his cousin," the defendant took the undercover agent to the third party's house and went inside and purchased cocaine for the agent, and there was no evidence of whether the third party was acting on behalf of the narcotics agents. Since the defendant would be entitled to an acquittal on the ground of entrapment if the third party was assisting the narcotics agent, it was relevant for a jury to hear first hand evidence of whether the third party was or was not acting on behalf of the agents, and the State should have been required to provide such evidence. Daniels v. State, 569 So. 2d 1174, 1990 Miss. LEXIS 630 (Miss. 1990).

District attorney's statement on voir dire, to the effect that trial would not be like one on television and that the jurors could not expect the defendant to confess, was not such improper comment on defendant's right not to testify as to require a new trial. Bridgeforth v. State, 498 So. 2d 796, 1986 Miss. LEXIS 2852 (Miss. 1986).

Conflict of interest on part of assistant district attorney who prosecutes cause after having previously counseled defendant in same matter while attorney was in private practice is ground for new trial notwithstanding defendant's failure to object at outset of trial. Gray v. State, 469 So. 2d 1252, 1985 Miss. LEXIS 2097 (Miss. 1985).

In a burglary prosecution, where the only evidence offered by the state connecting the defendant with the crime in any way was the uncorroborated testimony of an accomplice, who was an admitted narcotics user, and whose testimony was impeached by the unimpeached and uncontradicted testimony of seven alibi witnesses, and the testimony of a medical doctor who was qualified as an expert on drug addicts to the effect that an addict's reputation for truth and veracity was poor and that he could not be believed under oath, the defendant's motion for a new trial should have been sustained on the ground that the verdict was against the great weight of the evidence. Hutchins v. State, 220 So. 2d 276, 1969 Miss. LEXIS 1441 (Miss. 1969).

Although a separated juror has had communication during a trial with one not a juror, it is not a ground for a new trial if it is affirmatively shown that the separated juror was not so communicated with as to injure the defendant. Pepper v. State, 200 Miss. 891, 27 So. 2d 842, 1946 Miss. LEXIS 350 (Miss. 1946).

In the exercise of his authority under this section [Code 1942, § 1536], the trial court in a prosecution charging the defendant with being an accessory before the fact to the crime of robbery should have sustained defendant's motion for a new trial in view of the showing that two self-confessed accomplices contradicted each other in many material particulars with respect to defendant's participation in the crime, the fact that the principal, who admitted his bad reputation, was not corroborated in his testimony that defendant purchased cartridges for the hold-up en route to the scene of the crime, and the fact that the other accomplice escaped indictment by reason of having voluntarily testified before the grand jury, and then later admitted that he had not told the defendant's attorney the truth about the matter, thereby deliberately misleading the attorney in his preparation for the trial. De Angelo v. State, 187 Miss. 84, 192 So. 444, 1939 Miss. LEXIS 104 (Miss. 1939).

In murder prosecution of defendant for shooting his brother-in-law, evidence held insufficient to sustain conviction of manslaughter despite dying declaration of brother-in-law accusing defendant, where testimony of eyewitnesses made out a case of self-defense, warranting reversal and remand for new trial. Conway v. State, 177 Miss. 461, 171 So. 16, 1936 Miss. LEXIS 270 (Miss. 1936).

3. —As warranting directed verdict.

When defendant who has failed to renew his motion for directed verdict at conclusion of all evidence makes motion for new trial and assigns as ground that verdict of jury is not supported by evidence but is contrary to both law and evidence and proof fails to disclose existence of essential element of crime charged, supreme court will reverse conviction and remand case for new trial on ground that verdict is against great weight of evidence rather than reverse case and render judgment, because of failure of defendant to request directed verdict at close of all the evidence. Smith v. State, 205 Miss. 170, 38 So. 2d 698, 1949 Miss. LEXIS 423 (Miss. 1949).

4. Limitation on number of new trials.

In criminal prosecutions, judge may grant two new trials on ground verdict is against weight of evidence, thereafter jury's judgment controls. Heflin v. State, 178 So. 594 (Miss. 1938).

When evidence fails to show defendant's guilt beyond reasonable doubt, court has right under statute to twice set up its judgment against verdict of jury, but after that the jury's verdict must prevail. Jolly v. State, 174 So. 244 (Miss. 1937).

RESEARCH REFERENCES

ALR.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial. 67 A.L.R.2d 191.

Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time. 69 A.L.R.3d 933.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused-modern state cases. 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty. 89 A.L.R.3d 263.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 A.L.R.4th 16.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters. 6 A.L.R.4th 1208.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 A.L.R.4th 180.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters. 7 A.L.R.4th 942.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 A.L.R.4th 582.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 A.L.R.4th 410.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trail. 57 A.L.R.4th 1049.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial or mistrial. 60 A.L.R.4th 1063.

Prosecutor's appeal in criminal case to radical, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence–modern cases. 70 A.L.R.4th 664.

Standard for granting or denying new trial in state criminal case on basis of recanted testimony–modern cases. 77 A.L.R.4th 1031.

Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal – Individualized determinations. 104 A.L.R.5th 357.

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial. 44 A.L.R. Fed. 13.

Time limitations in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure. 51 A.L.R. Fed. 482.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness. 59 A.L.R. Fed. 657.

Am. Jur.

58 Am. Jur. 2d, New Trial § 6.

8 Am. Jur. Pl & Pr Forms (Rev), Criminal Procedure, Forms 385 et seq. (motion for new trial); Form 401 (order granting or denying motion in arrest of judgment or for new trial).

18A Am. Jur. Pl & Pr Forms (Rev), New Trial, Forms 1 et seq. (notice of motion for new trial); Forms 21 et seq. (motion for new trial); Forms 171 et seq. (order granting or denying new trial).

CJS.

23A C.J.S., Criminal Law §§ 1924 et seq.

§ 99-17-49. New trials; grant or refusal assignable for error.

When a motion for a new trial shall be granted or refused, either party may reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case, and also the decision of the court on said motion, and tender the same as a bill of exceptions; and it shall be the duty of the judge to allow and sign the same. Such bill of exceptions shall be a part of the record in the cause, and it may embrace the motion, the judgment, or other matters of record. The appellant may assign for error that the court below improperly granted or refused a new trial.

HISTORY: Codes, 1857, ch. 61, art. 168; 1871, § 648; 1880, § 1720; 1892, § 739; 1906, § 801; Hemingway's 1917, § 589; 1930, § 593; 1942, § 1537.

Cross References — Duty of judge to sign bills of exceptions, see § 99-17-39.
New trials, see MRCrP 25.1 through 25.4.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Matters assignable as error.
3. Review.

1. In general.

It is not necessary, under the statute, to except to the action of the court in passing upon a motion for a new trial. State v. Spengler, 74 Miss. 129, 20 So. 879, 1896 Miss. LEXIS 129 (Miss. 1896).

2. Matters assignable as error.

In a murder trial defendant cannot claim error in that he was not present when motion for new trial was heard, where contention was neither mentioned to trial court, nor in assignment of errors nor in original brief, but was mentioned for the first time in reply brief on appeal. Sims v. State, 209 Miss. 545, 47 So. 2d 849, 1950 Miss. LEXIS 412 (Miss. 1950).

In a motion for a new trial the erroneous rulings assigned as grounds for the motion must be specifically stated. Richberger v. State, 90 Miss. 806, 44 So. 772, 1907 Miss. LEXIS 122 (Miss. 1907); Borroum v. State, 94 Miss. 88, 47 So. 480, 1908 Miss. LEXIS 8 (Miss. 1908).

Unless the record shows that the trial judge refused an instruction the same will not be good assignment of error. Evans v. State, 87 Miss. 459, 40 So. 8, 1905 Miss. LEXIS 166 (Miss. 1905).

3. Review.

In defendant's burglary trial, although the employee's identification of defendant at a later lineup was not 100 percent positive, the employee concluded that defendant matched the suspect, and police later stopped defendant in the same area, where several burglaries had occurred, and found several speakers in defendant's car that generally matched the stolen speakers; thus, the evidence was sufficient to support the jury's verdict, and defendant's motion for a new trial was properly denied. Coleman v. State, 841 So. 2d 1170, 2003 Miss. App. LEXIS 186 (Miss. Ct. App. 2003).

Supreme Court will not, on appeal from murder conviction, consider objection to remarks made by district attorney in his argument to jury, when no objection was offered to remarks at the time they were made, no bill of exceptions was taken, no motion for mistrial was asked by defendant, and trial judge was not asked for ruling. Woods v. State, 37 So. 2d 319 (Miss. 1948).

Unless waived by the state, in criminal case, motion for new trial on ground that verdict of conviction was against overwhelming weight of evidence is necessary before supreme court can consider sufficiency of evidence to support verdict. Faust v. State, 204 Miss. 297, 37 So. 2d 315, 1948 Miss. LEXIS 365 (Miss. 1948).

Denial of new trial grounded upon refusal of continuance on account of absence of witnesses by whom defendant claimed he could prove an alibi in prosecution for grand larceny, was warranted where defendant failed to procure the affidavits of such witnesses as to what their testimony would have been. Russell v. State, 203 Miss. 883, 34 So. 2d 722, 1948 Miss. LEXIS 334 (Miss. 1948).

The supreme court is without authority to consider, on motion for certiorari, a prayer that a motion for a new trial made after adjournment of the term be sent up and incorporated into the appeal record. Dobbs v. State, 200 Miss. 595, 27 So. 2d 551, 29 So. 2d 84, 1946 Miss. LEXIS 330, 1947 Miss. LEXIS 354 (Miss. 1946), cert. denied, 331 U.S. 787, 67 S. Ct. 1318, 91 L. Ed. 1817, 1947 U.S. LEXIS 2295 (U.S. 1947), overruled in part, Flowers v. State, 473 So. 2d 164, 1985 Miss. LEXIS 2140 (Miss. 1985).

RESEARCH REFERENCES

ALR.

What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter. 34 A.L.R.2d 1181.

Appeal by state of order granting new trial in criminal case. 95 A.L.R.3d 596.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 A.L.R.4th 659.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 A.L.R.4th 11.

Prosecutor's appeal in criminal case to radical, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence–modern cases. 70 A.L.R.4th 664.

Am. Jur.

4 Am. Jur. 2d, Appellate Review §§ 172 et seq.

5 Am. Jur. 2d, Appellate Review §§ 755 et seq.

6 Am. Jur. Trials, Making and Preserving the Record–Objections, § 31.

CJS.

4 C.J.S., Appeal and Error §§ 317 et seq.

CHAPTER 18.

OFFICE OF STATE PUBLIC DEFENDER

Sec.
99-18-1. Office of State Public Defender created; personnel; funding sources; qualifications, duties, removal of state defender; funding of agency expenses; deposit of monies into State General Fund.
99-18-3. Capital Defense Counsel Division created; personnel; appointment to office; qualifications; removal.
99-18-5. Purpose of Capital Defense Counsel Division.
99-18-7. Duties of division; attorneys appointed to office to be full time.
99-18-9. Compensation.
99-18-11. Office hours of operation.
99-18-13. Powers and duties of State Defender.
99-18-15. Director to keep a docket of all indicted death eligible cases in Mississippi.
99-18-17. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Defense Counsel Fund.
99-18-19. Repealed.

§ 99-18-1. Office of State Public Defender created; personnel; funding sources; qualifications, duties, removal of state defender; funding of agency expenses; deposit of monies into State General Fund.

(1) There is hereby created the Office of State Public Defender. The Office of State Public Defender shall consist of a State Defender who shall be appointed by the Governor with the advice and consent of the Senate for a term of four (4) years and staffed by any necessary personnel as determined and hired by the State Defender.

(2) Funding for the Office of State Public Defender shall come from funds available in the Capital Defense Counsel Fund, the Indigent Appeals Fund and the Public Defenders Education Fund as determined by the State Defender. The State Defender shall have the authority to transfer funds between the various funds to efficiently and effectively accomplish the mission of the Office of State Public Defender and its divisions.

(3) The State Defender must be a duly licensed attorney admitted to the practice of law in this state, have practiced in the area of criminal law for at least five (5) years and shall meet all qualifications to serve as lead trial and appellate counsel in death penalty cases as may be set by the Supreme Court of Mississippi. The salary of the State Defender shall be no more than the maximum amount allowed by statute for a district attorney.

(4) The State Defender may be removed by the Governor upon finding that the State Defender is not qualified under law, has failed to perform the duties of the office, or has acted beyond the scope of the authority granted by law for the office.

(5) The Office of State Public Defender shall be responsible for the administration, budget and finances of the Divisions of Capital Defense

Counsel, Indigent Appeals and Public Defender Training, which shall be divisions of the Office of State Public Defender.

(6) The State Defender may simultaneously serve as State Defender and as director of one or more divisions but shall receive no additional compensation for doing so. Nothing in this chapter shall prohibit the State Defender from directly representing clients of the office. Nothing in this chapter shall be construed to prevent an employee of one (1) division of the Office of the State Public Defender from working, in whole or in part, for another division.

(7) The State Defender shall coordinate the collection and dissemination of statistical data and make such reports as are required of the divisions, develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force and to act as spokesperson for all matters relating to indigent defense representation.

(8) From and after July 1, 2016, the expenses of this agency shall be defrayed by appropriation from the State General Fund and all user charges and fees authorized under this section shall be deposited into the State General Fund as authorized by law.

(9) From and after July 1, 2016, no state agency shall charge another state agency a fee, assessment, rent or other charge for services or resources received by authority of this section.

HISTORY: Laws, 2000, ch. 569, § 19; Laws, 2011, ch. 343, § 1; Laws, 2012, ch. 383, § 2; Laws, 2016, ch. 459, § 64, eff from and after July 1, 2016.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Laws of 2016, ch. 459, § 1, codified as § 27-104-201, provides:

"SECTION 1. This act shall be known and may be cited as the 'Mississippi Budget Transparency and Simplification Act of 2016.' "

Cross References — Salary of Attorney General, see § 25-3-31.

Salary of district attorneys, see § 25-3-35.

Public defenders, generally, see §§ 25-32-1 et seq.

Prohibition against one state agency charging another state agencies fees, etc., for services or resources received, see § 27-104-35.

Defrayal of expenses of certain state agencies by appropriation of Legislature from General Fund, see § 27-104-37.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Appointment of post-conviction counsel in capital cases, see § 99-39-23.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Office of Indigent Appeals, see § 99-40-1.

RESEARCH REFERENCES

Law Reviews.

Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-18-3. Capital Defense Counsel Division created; personnel; appointment to office; qualifications; removal.

There is hereby created the Capital Defense Counsel Division within the Office of the State Public Defender. This office shall consist of a director, sometimes referred to as Capital Defender, who shall be an attorney qualified to serve as lead counsel in death penalty eligible cases and staffed by any necessary personnel as determined and hired by the State Defender. The Capital Defender shall be appointed by the State Defender. The remaining attorneys and other staff shall be appointed by the State Defender and shall serve at the will and pleasure of the State Defender. The Capital Defender and all other attorneys in the office shall be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. The Capital Defender may be removed by the State Defender upon finding that the Capital Defender is not qualified under law, has failed to perform the duties of the office, or has acted beyond the scope of the authority granted by law for the office.

HISTORY: Laws, 2000, ch. 569, § 20; Laws, 2011, ch. 343, § 2, eff from and after July 1, 2011.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the fourth sentence of Section 20 of Chapter 569, Laws, 2000. The words "advise and consent of the Senate" were changed to "advice and consent of the Senate." The Joint Committee ratified the correction at its June 29, 2000 meeting.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

RESEARCH REFERENCES

Law Reviews.

Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-18-5. Purpose of Capital Defense Counsel Division.

The Capital Defense Counsel Division is created within the Office of the State Public Defender for the purpose of providing representation to indigent parties under indictment for death penalty eligible offenses and to perform such other duties as set forth by law.

HISTORY: Laws, 2000, ch. 569, § 21; Laws, 2011, ch. 343, § 3, eff from and after July 1, 2011.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides: "SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

§ 99-18-7. Duties of division; attorneys appointed to office to be full time.

The Capital Defense Counsel Division shall limit its activities to representation of defendants accused of death-eligible offenses and ancillary matters related directly to death-eligible offenses and other activities expressly authorized by statute. Representation by the division or by other court-appointed counsel under this chapter shall terminate upon completion of trial or direct appeal. The attorneys appointed to serve in the Capital Defense Counsel Division shall devote their entire time to the duties of the division, shall not represent any persons in other litigation, civil or criminal, nor in any other way engage in the practice of law, and shall in no manner, directly or indirectly, engage in lobbying activities for or against the death penalty. Any violation of this provision shall be grounds for termination from employment by the State Defender.

HISTORY: Laws, 2000, ch. 569, § 22; Laws, 2011, ch. 343, § 4, eff from and after July 1, 2011.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides: "SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

§ 99-18-9. Compensation.

The Capital Defense Director appointed under this chapter shall be compensated at no more than the maximum amount allowed by statute for a district attorney, and other attorneys in the office shall be compensated at no more than the maximum amount allowed by statute for an assistant district attorney.

HISTORY: Laws, 2000, ch. 569, § 23; Laws, 2011, ch. 343, § 5, eff from and after July 1, 2011.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:
"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."
Cross References — District attorneys generally, see §§ 25-31-1 et seq.
Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.
Salary of district attorneys, see § 25-3-35.

§ 99-18-11. Office hours of operation.

The Capital Defense Counsel Division shall be open Monday through Friday for not less than eight (8) hours each day and observe such holidays and closings as prescribed by statute.

HISTORY: Laws, 2000, ch. 569, § 24; Laws, 2011, ch. 343, § 6, eff from and after July 1, 2011.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:
"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."
Cross References — Legal holidays, see § 3-3-7.

§ 99-18-13. Powers and duties of State Defender.

(1) The State Defender is hereby empowered to pay and disburse salaries, employment benefits and charges relating to employment of division staff and to establish their salaries and expenses of the office; to incur and pay travel expenses of staff necessary for the performance of the duties of the office; to rent or lease on such terms as he may think proper such office space as is necessary in the City of Jackson to accommodate the staff; to enter into and perform contracts and to purchase such necessary office supplies and equipment as may be needed for the proper administration of said offices within the funds appropriated for such purpose; and to incur and pay such other expenses as are appropriate and customary to the operation of the office.

(2) The State Defender may provide representation to parents or guardians who have been determined by the youth court judge to be indigent and in need of representation in an abuse, neglect or termination of parental rights proceeding or appeal therefrom. Representation may be provided by staff or contract counsel including, but not limited to, by contract with legal services organizations.

HISTORY: Laws, 2000, ch. 569, § 25; Laws, 2011, ch. 343, § 7; Laws, 2016, ch. 505, § 2, eff from and after July 1, 2016.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides: "SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

§ 99-18-15. Director to keep a docket of all indicted death eligible cases in Mississippi.

The Capital Defense Director shall keep a docket of all indicted death-eligible cases originating in the courts of Mississippi which must, at all reasonable times, be open to inspection by the public and must show the county, district and court in which the cause is pending. The director shall prepare and maintain a roster of all death penalty cases in the courts of Mississippi indicating the current status of each case and submit this report to the Governor, Chief Justice of the Supreme Court and the Administrative Office of Courts monthly. The director shall also report monthly to the Administrative Office of Courts the activities, receipts and expenditures of the office.

HISTORY: Laws, 2000, ch. 569, § 26; Laws, 2011, ch. 343, § 8, eff from and after July 1, 2011.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides: "SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

§ 99-18-17. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Defense Counsel Fund.

(1) If at any time during the representation of two (2) or more defendants,

the State Defender determines that the interests of those persons are so adverse or hostile they cannot all be represented by the staff of the Capital Counsel Division without conflict of interest, or if the State Defender determines that the volume or number of representations shall so require, the State Defender, in his sole discretion, notwithstanding any statute or regulation to the contrary, shall be authorized to employ qualified private counsel. Fees and expenses approved by order of the court of original jurisdiction, including investigative and expert witness expenses of such private counsel, shall be paid by funds appropriated to the Capital Defense Counsel Fund for this purpose.

(2) There is created in the State Treasury a special fund to be known as the Capital Defense Counsel Fund. The purpose of the fund shall be to provide funding for the Capital Defense Counsel Division. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the State Defender. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature for the purposes of funding the Capital Defense Counsel Division;
(b) The interest accruing to the fund;
(c) Monies received under the provisions of Section 99-19-73;
(d) Monies received from the federal government;
(e) Donations; and
(f) Monies received from such other sources as may be provided by law.

HISTORY: Laws, 2000, ch. 569, § 27; Laws, 2005, ch. 413, § 2; Laws, 2011, ch. 343, § 9, eff from and after July 1, 2011.

Editor's Notes — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:
"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

§ 99-18-19. Repealed.

Repealed by Laws of 2011, ch. 343,§ 13, effective from and after July 1, 2011.

§ 99-18-19. [Laws, 2000, ch. 569, § 28, eff from and after July 1, 2000.]

Editor's Notes — Former § 99-18-19 provided that, upon determination of indigence, the circuit court could appoint local counsel for the purpose of defending death-eligible indigent defendants at the expense of the Capital Defense Counsel Special Fund, and that upon determination of lack of competent local counsel a State Defender could be appointed.

CHAPTER 19.

JUDGMENT, SENTENCE, AND EXECUTION

In General. 99-19-1
Sentencing of Habitual Criminals. 99-19-81
Separate Sentencing Proceeding to Determine Punishment in Capital Cases. 99-19-101
Victim Impact Statement Act. 99-19-151
HIV and AIDS Testing of Persons Convicted of Sex Offenses. 99-19-201
Enhanced Penalties for Offenses Committed for Discriminatory Reasons. 99-19-301
Enhanced Penalties for Crimes Committed Against Elderly Persons. 99-19-351
Enhanced penalties for unlawful use of financial instruments or identifying information taken from owner by means of violent crime or burglary. 99-19-401

IN GENERAL

Sec.
99-19-1. Change of law not to affect prosecution or punishment of crime committed prior to change.
99-19-3. Convictions obtained only by verdict or guilty plea; no punishment without legal conviction; waiver of right to trial and payment of fine in lieu thereof without appearing in court for traffic, motor vehicle, and game and fish misdemeanor violations; definitions.
99-19-5. Findings of jury.
99-19-7. Verdict as to some, disagreement as to other defendants.
99-19-9. No special form of verdict required.
99-19-11. Verdict may be reformed at the bar if informal or defective.
99-19-12. Repealed.
99-19-13. Mississippi Sentencing Disparity Task Force; purpose; composition.
99-19-15. Sentence; felon under age sixteen.
99-19-17. Repealed.
99-19-18. Mandatory minimum sentence for embezzlement or other unlawful conversion of public funds.
99-19-19. Repealed.
99-19-20. Sentence; imposition of fine; payment; imprisonment for nonpayment; indigent defendants.
99-19-20.1. Nonpayment of fine, restitution or court costs not automatically followed by incarceration; indigent defendants.
99-19-21. Sentence; prison terms to run consecutively or concurrently in discretion of court; sentence for felony committed while on parole, probation, earned-release or post-release supervision, or suspended sentence.
99-19-23. Sentence; credit for time of prisoner's pre-trial or pre-appeal confinement.
99-19-25. Sentence; circuit and county judges and justice courts may suspend in misdemeanor cases; suspension of sentence or execution of sentence subsequent to original sentencing authorized under certain circumstances.
99-19-27. Convicts who violate terms of suspended sentence or parole are subject to arrest.
99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.

Sec.
99-19-31. Penalty where none fixed elsewhere by statute.
99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.
99-19-33. Where penalty modified milder penalty may be imposed.
99-19-35. Person convicted of certain crimes not to practice medicine or dentistry, or hold office.
99-19-37. Restoration of right of suffrage to World War veterans.
99-19-39. Detention of convict pending appeal.
99-19-41. Delivery of appellant to county where supreme court is held.
99-19-42. Post-conviction proceeding; time for hearing and return to Department of Corrections.
99-19-43. Duty of judge when convict sentenced to penitentiary.
99-19-45. Commitment to penitentiary; duties of clerks of circuit court; fees.
99-19-47. Commitment to penitentiary; form.
99-19-48. Placement of person on probation; form for report.
99-19-49. Repealed.
99-19-51. Manner of execution of death sentence; execution team; confidentiality of identities of members of execution team, supplier of lethal injection chemicals and witnesses listed in Section 99-19-55(2); immunity.
99-19-53. Execution of death sentence; state executioner.
99-19-55. Execution of death sentence; procedure; witnesses; certificate of execution; disposition of body.
99-19-57. Execution of death sentence; suspension of sentence when offender is pregnant or a person with mental illness.
99-19-59. Repealed.
99-19-61. Cost of trial and/or execution of one committing crime within confines of penitentiary, or of inmate committing crime outside bounds of penitentiary.
99-19-63. Repealed.
99-19-65. Collection of fines, penalties, and list reported.
99-19-67. Remedy against officer, in reference to fines.
99-19-69. Liability of officers for default as to fines.
99-19-71. Expunction of misdemeanor conviction of first offender upon petition; expunction of certain felony convictions upon petition.
99-19-72. Filing fee for petition to expunge certain first offenses; distribution of fees collected.
99-19-73. Standard State monetary assessment for certain violations, misdemeanors and felonies; suspension or reduction of assessment prohibited; collection and deposit of assessments; refunds.
99-19-75. Assessment on certain offenses to be deposited in Mississippi Children's Trust Fund or Victims of Human Trafficking and Commercial Sexual Exploitation Fund.
99-19-77. Assessment against convicted criminal defendants to cover costs of investigations; use of assessments.

§ 99-19-1. Change of law not to affect prosecution or punishment of crime committed prior to change.

No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of such penalties, notwithstanding amendatory or repealing statutes, unless otherwise specially provided in such statutes.

HISTORY: Codes, 1906, § 1573; Hemingway's 1917, § 1335; 1930, § 1361; 1942, § 2608; Laws, 1902, ch. 63.

Cross References — Effect of adoption of 1972 Code upon offenses committed theretofore, see § 1-1-23.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Post-conviction relief.
3. Retroactive application improper.

1. In general.

Defendant was correctly sentenced under the provisions of the statute in effect at the time he committed the crime of sale of a controlled substance because the addition of a quantity element to the crime of sale of a controlled substance did not create a completely new crime. Ware v. State, — So. 3d —, 2019 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 23, 2019), cert. denied, 279 So. 3d 1086, 2019 Miss. LEXIS 386 (Miss. 2019).

Circuit court properly sentenced defendant to 10 years in prison under the prior version of the grand larceny statute in effect at the time of the crime, as the statute required a trial court to sentence an offender under the sentencing statute in place at that time. Flowers v. State, 281 So. 3d 1103, 2019 Miss. App. LEXIS 253 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in sentencing defendant as an habitual offender to thirty years for possession of cocaine with intent to distribute because it was the maximum prison penalty at the time of his original sentence; defendant's original sentence was imposed when the maximum sentence prescribed for the crime was thirty years, and the statute that lowered the maximum penalty did not take effect until more than five years after the initial sentence Wells v. State, 202 So. 3d 1230, 2016 Miss. LEXIS 445 (Miss. 2016).

Daniels v. State, 742 So. 2d 1140 (Miss. 1999), and West v. State, 725 So. 2d 872 (Miss. 1998), are overruled to the extent that they conflict with Miss. Code Ann. § 99-19-1, which requires the trial court to sentence an offender under a sentencing statute in place at the time of the crime. Wilson v. State, 194 So. 3d 855, 2016 Miss. LEXIS 262 (Miss. 2016).

In a receiving stolen property case, the trial court properly sentenced defendant to serve 10 years in prison. Miss. Code Ann. § 99-19-1 required the trial court to sentence defendant under the sentencing statute in place at the time of the crime. Wilson v. State, 194 So. 3d 855, 2016 Miss. LEXIS 262 (Miss. 2016).

Trial court erred in not instructing the jury that life without the possibility of parole was an option under Miss. Code Ann. § 97-3-21 because, while the crime occurred prior to the amendment adding that option, the trial took place after the amendment, and under Miss. Code Ann. § 99-19-1, it had previously been held that § 97-3-21 clearly and lawfully directed capital defendants whose pre-trial, trial or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. Rubenstein v. State, 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Judge must consider alternative sentences available and in effect at time crime was committed, and not at time of sentencing, where subsequent amendment of statute limited alternatives available. Gardner v. State, 514 So. 2d 292, 1987 Miss. LEXIS 2520 (Miss. 1987).

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an ex post facto law as to persons who were sentenced to death before the enactment of statute. Wetzel v. Wiggins, 226 Miss. 671, 85 So. 2d 469, 1956 Miss. LEXIS 448 (Miss.), cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39, 1956 U.S. LEXIS 400 (U.S. 1956).

Enactment of statute legalizing sale and possession of beer pending appeal from conviction for possessing beer and intoxicating liquor, held without effect upon conviction. Brown v. State, 153 So. 175 (Miss. 1934).

One convicted of arson was properly sentenced under statute in effect when arson was committed, instead of under repealing statute enacted before trial prescribing lighter penalty, absent contrary provision in repealing statute. Byrd v. State, 165 Miss. 30, 143 So. 852, 1932 Miss. LEXIS 277 (Miss. 1932).

Under the express provisions of this section [Code 1942, § 2608], a prosecution under a law afterwards repealed does not relieve the defendant of the penalty. State v. Widman, 112 Miss. 1, 72 So. 782, 1916 Miss. LEXIS 49 (Miss. 1916).

A person being tried for a first violation cannot justly complain of the fact that pending his prosecution the law has been changed so as to provide a more severe penalty for a subsequent violation. Britton v. State, 101 Miss. 584, 58 So. 530, 1912 Miss. LEXIS 15 (Miss. 1912).

2. Post-conviction relief.

Defendant's motion for post-conviction relief was properly denied because his sentence was not illegal at the time it was entered and did not become illegal upon the passage of the 2000 amendment to Miss. Code Ann. § 47-5-1003. The revision to § 47-5-1003 relied upon by defendant did not become effective until over a year and a half after his sentencing; while the legislature could have required resentencing under the new provision, it did not do so. McBride v. State, 2005 Miss. App. LEXIS 314 (Miss. Ct. App. May 10, 2005), op. withdrawn, sub. op., 914 So. 2d 260, 2005 Miss. App. LEXIS 524 (Miss. Ct. App. 2005).

3. Retroactive application improper.

Defendant's manslaughter sentence was plain error, despite defendant submitting an instruction providing the harsher sentence, because (1) the sentence impacted a fundamental right, as the revised statute under which defendant was sentenced was not effective when the crime was committed, (2) the error was obvious, as it was not clear defendant relied on the greater sentence to escape a harsher penalty, and (3) the error affected the integrity of judicial proceedings, as defendant conceivably presumed a 20-year sentence would be applied and did not know a 30-year sentence was possible until after sentence was pronounced. Cozart v. State, 226 So. 3d 574, 2017 Miss. LEXIS 210 (Miss. 2017).

Since the amendment to Miss. Code Ann. § 97-17-41, that occurred between the time of the alleged larceny and trial did not specifically provide that the Legislature intended it to apply retroactively, under this section, the trial court did not err in instructing the jury on the elements of grand larceny as they existed at the time the crime was committed. Walters v. State, 206 So. 3d 524, 2016 Miss. LEXIS 503 (Miss. 2016).

When the statute under which defendant was sentenced was amended, the amendment did not entitle defendant to the post-conviction relief of being resentenced under the amended statute because (1) the sentence had become final when the statute was amended, (2) for a sentencing statute to be retroactive, the statute had to so state, and this statute did not, and (3) Miss. Code Ann. § 99-19-33 had no bearing, since defendant's conviction became final before the statute was amended. Barnett-Phillips v. State, 195 So. 3d 226, 2016 Miss. App. LEXIS 377 (Miss. Ct. App. 2016).

Chapter 457, Laws of 2014, amendments to Miss. Code Ann. § 97-17-70's elements and punishments are inextricably interrelated. Consequently, there is no viable approach to applying those amendments to defendants whose offenses were committed and charged prior to Chapter 457's effective date. Wilson v. State, 198 So. 3d 408, 2016 Miss. App. LEXIS 149 (Miss. Ct. App.), cert. denied, 202 So. 3d 616, 2016 Miss. LEXIS 368 (Miss. 2016).

Under Miss. Code Ann. § 99-19-1 (Rev. 2015) and the case law interpreting it, the Court of Appeals of Mississippi does not retroactively apply amendments to the elements of a criminal statute. Wilson v. State, 198 So. 3d 408, 2016 Miss. App. LEXIS 149 (Miss. Ct. App.), cert. denied, 202 So. 3d 616, 2016 Miss. LEXIS 368 (Miss. 2016).

Denial of the inmate's petition for post-conviction relief was proper where the revision to Miss. Code Ann. § 47-5-1003 relied upon by him did not become effective until over a year and a half after his sentencing. Thus, his sentence was not illegal at the time it was entered and did not become illegal upon the passage of the revision. McBride v. State, 914 So. 2d 260, 2005 Miss. App. LEXIS 524 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 720 (Miss. 2005).

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§ 99-19-3. Convictions obtained only by verdict or guilty plea; no punishment without legal conviction; waiver of right to trial and payment of fine in lieu thereof without appearing in court for traffic, motor vehicle, and game and fish misdemeanor violations; definitions.

(1) Except as provided in subsection (2) of this section, a person indicted for a criminal offense shall not be convicted thereof, unless by confession of his guilt in open court or by admitting the truth of the charge against him by his plea, or by the verdict of a jury accepted and recorded in court. A person charged with an offense shall not be punished therefor unless legally convicted thereof in a court having jurisdiction of the cause and of the person.

(2) In all cases in the circuit, county, justice and municipal courts involving a traffic misdemeanor violation or a game and fish misdemeanor violation where a person has been issued a ticket or has been formally charged by affidavit, indictment or information and desires to waive a trial and not appear in court and defend the charge, the amount of the fine, in the discretion of the court, may be paid in advance to the clerk of the court. When the fine is paid in advance, the person cited must be notified by language plainly printed on a waiver form or the ticket of the person's right to a trial and the consequences of the voluntary advance payment of the fine. In cases where

formal charges have been made and the person charged has been notified to appear in court at a certain date and time, the clerk of the court is authorized to accept a cash appearance bond, not to exceed the amount of the fine, conditioned upon the appearance of the person in court at the cited date and time. In the event of default, the cash appearance bond may be forfeited in payment of any judgment in the case in an amount not to exceed the amount of the bond; and in such cases of cash appearance bond forfeiture, it shall be final without necessity of judgment nisi and issuance of the writ of scire facias. In the event a person so cited or charged pays a fine in advance after notice of the person's rights, this shall constitute a waiver of formal charge, arraignment and trial; and in such cases and in cases of default on cash appearance bond, such action shall be a plea of nolo contendere by such person and the court, upon the advance payment of fine or the default on cash appearance bond, may convict the person of the offense stated in the ticket or formal charges without further appearance by the person. Traffic convictions shall be reported to the Commissioner of Public Safety as required by law and convictions for any offense charged by a conservation officer shall be reported to the Commissioner of Wildlife, Fisheries and Parks as required by law. It shall not be necessary to enter traffic misdemeanor cases in the municipal court docket.

(3) For the purposes of this section:

(a) The term "fine" means, in addition to the pecuniary punishment, all fees, costs, assessments and other charges required by law to be imposed in such cases.

(b) The term "traffic misdemeanor" means a violation of traffic or motor vehicle laws that do not require mandatory imprisonment upon conviction but shall not include repeat offenders where a sentence of imprisonment is likely and shall not include charges under the Mississippi Implied Consent Law.

(c) The term "game and fish misdemeanor" means a violation not punishable by imprisonment and charged by a conservation officer.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 1(4); 1857, ch. 64, art. 359; 1871, § 2866; 1880, § 3101; 1892, § 1456; 1906, § 1529; Hemingway's 1917, § 1291; 1930, § 1316; 1942, § 2564; Laws, 2002, ch. 320, § 1, eff from and after July 1, 2002.

Cross References — Conservation officer's generally, see § 49-1-13.

Mississippi Implied Consent Law, see §§ 63-11-1 et seq.

Procedures in criminal cases – minimum fine which may be imposed, see § 99-33-3.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Competency of defendant.
3. Withdrawal or vacating of guilty plea properly denied.
4. When defendant may withdraw guilty plea.

5. When plea agreement may be withdrawn; by whom.
6. Plea to lesser included offense.
7. Attorney's entry of guilty plea for defendant.
8. Confession.
9. Judicial misconduct.

1. In general.

Miss. Code Ann. § 99-19-3(1), requiring a jury trial or a guilty plea with a personal appearance for a conviction, only applied if a defendant had been indicted for an offense. Because defendant waived an indictment for the felony of armed robbery and pleaded guilty to the criminal information, § 99-19-3 did not apply in his case. Berry v. State, 19 So. 3d 137, 2009 Miss. App. LEXIS 392 (Miss. Ct. App. 2009).

Defendant was validily convicted by a verdict of the jury accepted and recorded in court, Miss. Code Ann. § 99-19-3(1), as the proceedings were in full compliance with Miss. Unif. Cir. & County. Ct. Prac. R. 3.10 and the trial court did not have to state expressly that the court accepted the verdict in order to effect defendant's conviction. Neal v. State, 15 So. 3d 388, 2009 Miss. LEXIS 272 (Miss. 2009), dismissed, — So. 3d —, 2016 Miss. LEXIS 340 (Miss. 2016).

While defendant did not specifically state at the plea hearing that he had killed the victim, the State indicated that defendant had given two statements, one oral and one written, wherein he confessed to killing the victim, and at the hearing, defendant admitted that he had committed robbery; the trial court was entitled to place great emphasis upon statements made under oath in open court during plea proceedings and sentencing. Smith v. State, 910 So. 2d 635, 2005 Miss. App. LEXIS 151 (Miss. Ct. App. 2005).

Guilty plea is voluntary if defendant knows what elements are in charge against him or her, including understanding of charges and its relation to defendant, effect of plea, and possible sentence. Taylor v. State, 682 So. 2d 359, 1996 Miss. LEXIS 532 (Miss. 1996).

Complete record should be made of plea proceeding to ensure that defendant's plea was entered voluntarily. Taylor v. State, 682 So. 2d 359, 1996 Miss. LEXIS 532 (Miss. 1996).

No evidence in record indicated that defendant accused of possession of cocaine was ever legally convicted based upon confession, plea of guilty or jury verdict; confusion of prosecutor, defense counsel and trial judge apparently transformed interrupted suppression hearing into hearing on merits even before motion to suppress was decided, and resulted in conclusion of sentencing hearing with sentence contingent on evidentiary ruling and no conclusive finding of guilt. Chunn v. State, 669 So. 2d 29, 1996 Miss. LEXIS 10 (Miss. 1996).

Admission of guilt is not a constitutional requisite of an enforceable plea. Reynolds v. State, 521 So. 2d 914, 1988 Miss. LEXIS 106 (Miss. 1988).

This section [Code 1942, § 2564] precludes a nolo contendere plea in a felony case. Bruno v. Cook, 224 So. 2d 567, 1969 Miss. LEXIS 1294 (Miss. 1969).

2. Competency of defendant.

Where the accused in grand larceny prosecution was totally illiterate and of questionable mental competence, his tendered plea of guilty should not have been accepted until the judge had determined that the accused was competent to understand the nature and consequences of the plea, had advised accused of his basic rights, and ascertained that the plea was voluntary. Caves v. State, 244 Miss. 853, 147 So. 2d 632, 1962 Miss. LEXIS 516 (Miss. 1962).

3. Withdrawal or vacating of guilty plea properly denied.

A circuit court properly summarily dismissed a defendant's post -conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel, where a transcript of the plea hearing showed that the trial court fully informed the defendant of the maximum sentence for the crime charged in the indictment and the effect of the habitual criminal statute if he subsequently committed another crime of violence and that the defendant acknowledged to the court that no one had threatened, abused or mistreated him in any way or promised him anything to cause him to wish to plead guilty, and the defendant did not contend that he lied to the court because of misrepresentations by his attorney. Garlotte v. State, 597 So. 2d 641, 1992 Miss. LEXIS 161 (Miss. 1992).

A defendant's complaints of ineffective assistance of counsel in his post-conviction relief motion alleging that his guilty plea was involuntarily made as a result of ineffective assistance of counsel were insufficient as a matter of law where the defendant failed to allege that the asserted errors of his attorney proximately resulted in his guilty plea and that, but for these errors, he would not have entered the plea. Garlotte v. State, 597 So. 2d 641, 1992 Miss. LEXIS 161 (Miss. 1992).

A circuit court properly summarily denied a defendant's post-conviction relief motion to vacate his murder conviction on the ground that his guilty plea was not made knowingly and intelligently and was devoid of a factual basis, even though the defendant did not admit outright that the killing of the victim was malicious, where the defendant struck the victim twice with the butt of a gun during an altercation and continued to knock the victim down each time he pulled himself up, and there was nothing in the record to suggest that the defendant was offered any hope of reward for entering his plea of guilty or that he was coerced, threatened or intimidated into making it, but, to the contrary, the circuit court interrogated the defendant thoroughly and carefully explained to him the full gamut of constitutional protections available to him as well as the ramifications of entering a guilty plea. Lott v. State, 597 So. 2d 627, 1992 Miss. LEXIS 149 (Miss. 1992).

There was no error in the trial court's refusal to allow a defendant, who had pled guilty to a charge of possession of marijuana, without representation by counsel but after a full inquiry by the court as to the defendant's understanding of his rights, to allow the defendant to withdraw his plea, notwithstanding that the defendant claimed that he had been induced by the county attorney's promise of a light sentence to plead guilty without representation by counsel. Debrow v. State, 235 So. 2d 712, 1970 Miss. LEXIS 1464 (Miss. 1970).

Overruling of motion to withdraw plea of guilty after conviction of unlawful possession of intoxicating liquor and to enter plea of not guilty was proper where motion did not allege defendant was innocent of the offense charged or any facts upon which innocence could be assumed or a legal defense predicated. Edwards v. State, 209 Miss. 325, 46 So. 2d 790, 1950 Miss. LEXIS 392 (Miss. 1950).

4. When defendant may withdraw guilty plea.

Before a person may plead guilty to a felony, he or she must be informed of his or her rights, the nature and consequences of the act he or she contemplates, and any other relevant facts and circumstances. Thus, a defendant who was not advised of the mandatory minimum sentence for the charge to which he was pleading, and who was ignorant of the mandatory minimum sentence at the time he plead guilty, was entitled to withdraw his plea of guilty, enter a plea of not guilty and be given a trial, since the failure to advise the defendant of the minimum penalty rendered his guilty plea involuntary as a matter of law. Vittitoe v. State, 556 So. 2d 1062, 1990 Miss. LEXIS 39 (Miss. 1990).

Mistaken advice of council may in some cases vitiate a guilty plea. Counsel's representation that a specified minimal sentence will be received may render a guilt plea involuntary but "mere expectation or hope" is not sufficient. Gardner v. State, 531 So. 2d 805, 1988 Miss. LEXIS 481 (Miss. 1988).

When a convicted defendant challenges his guilty plea on grounds of ineffective assistance of counsel, he must show unprofessional errors of substantial gravity. Reynolds v. State, 521 So. 2d 914, 1988 Miss. LEXIS 106 (Miss. 1988).

5. When plea agreement may be withdrawn; by whom.

A district attorney did not have unilateral authority to rescind a plea bargain agreement on the basis that the defendant had lied to him about certain key information even though the language of the "memorandum of understanding" gave the district attorney the right to rescind the agreement at any point if the defendant was untruthful. The question of whether a defendant failed to perform a condition precedent is an issue not to be finally determined unilaterally by the government, but by the court on the basis of adequate evidence. Danley v. State, 540 So. 2d 619, 1988 Miss. LEXIS 640 (Miss. 1988).

State court's affirmance of a criminal conviction, entered on a guilty plea, was vacated and the case remanded, where the prosecution, contrary to a "plea bargaining" agreement, had recommended the maximum sentence and such maximum sentence was imposed. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, 1971 U.S. LEXIS 1 (U.S. 1971).

6. Plea to lesser included offense.

Circuit court had jurisdiction to accept guilty plea from defendant to grand larceny offenses, adjudge him guilty, and impose sentence even though defendant appeared on indictment charging burglaries since defendant could have been tried and convicted of grand larceny upon request that lesser offense of grand larceny be considered if he had gone to trial on burglary charges. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

Court having subject matter jurisdiction is empowered to proceed once indictment has been served on defendant, and subsequent guilty plea to lesser related offense does not deprive court of personal jurisdiction over defendant. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

Assault with intent to rape under former § 2361 is sufficiently a lesser included constituent offense of forcible rape such that a plea-bargain-induced guilty plea thereto under an indictment charging forcible rape will withstand subsequent post-conviction attack. Grayer v. State, 519 So. 2d 438, 1988 Miss. LEXIS 52 (Miss. 1988).

7. Attorney's entry of guilty plea for defendant.

One charged with a felony must plead to an indictment in person, and a plea of "guilty" entered by his attorney is invalid. Mareno v. State, 226 So. 2d 905, 1969 Miss. LEXIS 1331 (Miss. 1969).

8. Confession.

Inmate's petition for post-conviction relief was properly denied because a plea of guilty during a plea hearing was sufficient to constitute an admission of guilt to the charge of capital murder. Daughtery v. State, 847 So. 2d 284, 2003 Miss. App. LEXIS 504 (Miss. Ct. App. 2003).

The provisions of this section for the conviction of a person upon "a confession of his guilt in open court or by admitting the truth of the charge against him" apply only when the confession or admission is made to the charge for which the defendant is then being tried. Thus, in a prosecution of two defendants for spotlighting deer following their conviction in a justice of the peace court, the circuit court erred in convicting them of unlawfully hunting from a public road based upon admissions or confessions made during trial where the only offense for which they were on trial was that of spotlighting deer. Sanchez v. State, 385 So. 2d 624, 1980 Miss. LEXIS 2028 (Miss. 1980).

9. Judicial misconduct.

Judge was publicly reprimanded and suspended for 30 days for misconduct which brought the judicial office into disrepute pursuant to Miss. Const. art. VI, § 177A in failing to properly adjudicate criminal matters, and engaging in ticket-fixing, in exchange for simultaneous payments to a "drug fund" established and maintained by the town police chief, which violated Miss. Code Jud. Conduct Canons 1, 2A, 3B(1), 3B(2), 3B(8); the judge admitted that his decision to accept the lesser pleas contingent on payments into the drug fund was at least partially motivated by his desire to collect fees for the town, and this was not a mistake of the law, but a clear disregard of it, and was sanctionable. After considering the Gibson factors, the commission's recommendation was adopted. Miss. Comm'n on Judicial Performance v. Smith, 109 So. 3d 95, 2013 Miss. LEXIS 64 (Miss. 2013).

OPINIONS OF THE ATTORNEY GENERAL

Following the 2002 amendment of the statute, guilty or nolo contendere pleas for misdemeanor cases in municipal court, other than misdemeanor traffic violations and misdemeanor game and fish violations, must be accepted by a judge and not the municipal court clerk. Payne, May 10, 2002, A.G. Op. #02-0240.

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Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 A.L.R.2d 549.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes. 43 A.L.R.3d 281.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 A.L.R.3d 1291.

Right to withdraw guilty plea in state criminal proceedings where court refuses to grant concession contemplated by plea bargain. 66 A.L.R.3d 902.

Validity and efficacy of accused's waiver of unanimous verdict. 97 A.L.R.3d 1253.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 A.L.R.4th 1089.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 A.L.R.4th 251.

Power of court to increase severity of unlawful sentence–modern status. 28 A.L.R.4th 147.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 A.L.R.4th 504.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession. 51 A.L.R.4th 495.

Prohibition of federal trial judge's participation in plea bargaining negotiations under Rule 11(e)(1) of the Federal Rules of Criminal Procedure. 56 A.L.R. Fed. 529.

Lawyers' Edition.

Validity of guilty pleas. 25 L. Ed. 2d 1025.

§ 99-19-5. Findings of jury.

(1) On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.

(2) For purposes of this section, manslaughter shall be considered a lesser included offense of murder and capital murder, and the jury may be properly instructed thereon, upon request by either party or upon the court's own motion, in any case in which the giving of such instruction would be justified by the proof, consistent with the wording of the applicable manslaughter statute.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8(22); 1857, ch. 64, art. 305; 1871, § 2809; 1880, § 3078; 1892, § 1426; 1906, § 1499; Hemingway's 1917, § 1257; 1930, § 1280; 1942, § 2523; Laws, 2004, ch. 393, § 3, eff from and after passage (approved Apr. 20, 2004.).

Cross References — Murder, capital murder, lesser included offenses defined, see § 97-3-19.

Verdicts, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

Verdicts, see MRCrP 24.1 through 24.6.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Attempts.
3. Lesser included offenses.
4. Lesser nonincluded offenses.

1. In general.

Defendant's purported conviction for robbery was plain error because he had been indicted for burglary, not the entirely distinct crime of robbery, which was not a lesser-included offense of burglary, and a court could not make, alter, or substantively amend a felony indictment; defendant's conviction for robbery was a plain, clear, and obvious error that violated his fundamental rights and constituted a manifest miscarriage of justice. Pace v. State, 242 So. 3d 107, 2018 Miss. LEXIS 199 (Miss. 2018).

Defendant admitted and the record revealed that defendant, not the State, requested the accessory after the fact instruction. Thus, defendant could not complain on appeal that the instruction was erroneously granted. Parks v. State, 884 So. 2d 738, 2004 Miss. LEXIS 1165 (Miss. 2004).

This section authorizes only convictions of inferior constituent offenses unless there be an additional count in the indictment. Hailey v. State, 537 So. 2d 411, 1988 Miss. LEXIS 632 (Miss. 1988).

On indictment for any offense the jury may find the defendant guilty of the offense as charged or any attempt to commit the same offense or may find him guilty of an inferior offense. Callahan v. State, 419 So. 2d 165, 1982 Miss. LEXIS 2120 (Miss. 1982).

On indictment for any offense the jury may find the defendant guilty of the offense as charged or of attempt to commit the same offense or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose. Simmons v. Bonslagel, 272 So. 2d 664, 1973 Miss. LEXIS 1551 (Miss. 1973).

A conviction under indictment charging assault and battery "with intent to commit manslaughter" is a conviction of the assault and battery only. Ex parte Burden, 92 Miss. 14, 45 So. 1, 1907 Miss. LEXIS 5 (Miss. 1907).

2. Attempts.

After the close of the State of Mississippi's case-in-chief, the trial court properly granted the State's motion to amend the indictment to charge defendant with felonious attempt to leave the scene of the accident rather than the completed offense. An amendment to the indictment to charge an attempt was proper because it had the same result as a permissible jury instruction on the attempt charge. Moffett v. State, 287 So. 3d 975, 2019 Miss. App. LEXIS 549 (Miss. Ct. App. 2019).

Amendment to the indictment charging defendant with false pretense in violation of Miss. Code Ann. § 97-19-39 did not prejudice defendant, and the circuit court did not err in allowing the amendment under Miss. Code Ann. § 99-19-5(1) to change the charge to attempt to commit false pretense; defendant was on notice that he could be convicted of attempt to commit any of the offenses with which he was charged in the indictment. Patton v. State, 109 So. 3d 66, 2012 Miss. LEXIS 612 (Miss. 2012), cert. denied, 571 U.S. 1075, 134 S. Ct. 687, 187 L. Ed. 2d 556, 2013 U.S. LEXIS 8618 (U.S. 2013).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291, 2008 Miss. App. LEXIS 626 (Miss. Ct. App. 2008).

Indictment sufficiently charged the offense because it charged that defendant and her co-defendants acted with the intent to steal the property of the bank. The indictment also charged that they did so by exhibiting and firing a pistol – acts which put the employees of the bank in fear of immediate injury to their persons. Glenn v. State, 996 So. 2d 148, 2008 Miss. App. LEXIS 584 (Miss. Ct. App. 2008).

Defendant was convicted of attempted possession of cocaine and on appeal defendant argued that the trial court erred in instructing the jury on attempt; the argument lacked merit because Miss. Code Ann. § 99-19-5 made clear that a jury may find a defendant guilty of the offense as charged, or any attempt to commit the same offense, or the jury could find him guilty of an inferior offense on an indictment for any offense. Randolph v. State, 973 So. 2d 254, 2007 Miss. App. LEXIS 506 (Miss. Ct. App. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. Neal v. State, 936 So. 2d 463, 2006 Miss. App. LEXIS 589 (Miss. Ct. App. 2006).

Amendment of indictment from sexual battery to attempted sexual battery during trial did not prejudice defendant; by virtue of attempt statute, defendant had notice that he could be convicted of attempt charge. Hughes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 564 (Miss. 1995).

In a prosecution on a charge of having pointed and aimed a gun at another person, where the evidence offered by the state tended to show that defendant went into his house, obtained a gun, came out on the front porch in a scuffle with his wife over the weapon and was prevented by her from raising it to a position where it could be either pointed or aimed at anyone, the defendant was not entitled to a peremptory instruction, since under the proof the jury might have been entitled to convict him of an attempt to commit the offense charged. Austin v. State, 192 Miss. 342, 6 So. 2d 121, 1942 Miss. LEXIS 20 (Miss. 1942).

It is not reversible error for the court to refuse an instruction informing the jury that it will find defendants not guilty unless it believes certain hypotheses which omit the hypothesis of attempt to commit the crime. Chandler v. State, 143 Miss. 312, 108 So. 723, 1926 Miss. LEXIS 268 (Miss. 1926).

Supreme court will not reverse conviction for attempt to commit crime for refusal of instruction to find defendant guilty, unless jury believe certain hypotheses omitting the hypothesis of attempt to commit the crime. Chandler v. State, 143 Miss. 312, 108 So. 723, 1926 Miss. LEXIS 268 (Miss. 1926).

It is proper to refuse to charge that defendant on trial for rape cannot be convicted of an attempt to rape, though the indictment does not contain a count charging such attempt. Horton v. State, 84 Miss. 473, 36 So. 1033, 1904 Miss. LEXIS 81 (Miss. 1904).

3. Lesser included offenses.

In a murder case, Miss. Code Ann. § 99-19-5 put defendant on statutory notice that the jury could convict him of any lesser-included offense, even if the lesser-included offense was not listed in a separate count of the indictment. Thompson v. State, 269 So. 3d 301, 2018 Miss. App. LEXIS 175 (Miss. Ct. App. 2018).

Circuit court properly dismissed appellant's postconviction relief (PCR) motion because the doctrine of res judicata applied to appellant's argument that the jury in his capital-murder conviction was not instructed as to any of the three essential elements of the underlying felony of attempted rape; the jury-instruction issue had already been addressed by the court of appeals in one of appellant's previous PCR motions. Pickle v. State, 203 So. 3d 753, 2016 Miss. App. LEXIS 724 (Miss. Ct. App. 2016), cert. denied, 216 So. 3d 1151, 2017 Miss. LEXIS 212 (Miss. 2017), cert. denied, — So. 3d —, 2017 Miss. LEXIS 215 (Miss. 2017).

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. Edwards v. State, 124 So. 3d 105, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. 2013).

Defendant's burglary conviction was inappropriate because the trial court clearly erred by granting the State's request for an instruction on burglary since burglary was not a lesser-included offense of capital murder and since the State was not entitled to a lesser-offense instruction, Miss. Code Ann. § 99-19-5(1). Gause v. State, 65 So. 3d 295, 2011 Miss. LEXIS 314 (Miss. 2011), limited, Hall v. State, 127 So. 3d 202, 2013 Miss. LEXIS 649 (Miss. 2013).

Evidence was sufficient to convict defendant of manslaughter under Miss. Code Ann. § 97-3-35 as she was the only other person in the house, a deadly weapon was used, there was no evidence of self-defense, and scientific evidence of the gunshot wound showed that the victim could not have inflicted it himself, either by accident or suicide. Further, there was no prejudice to defendant as she was convicted of the lesser-included offense where proof would have supported conviction of the greater offense of deliberate-design murder. Simpson v. State, 993 So. 2d 400, 2008 Miss. App. LEXIS 334 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 552 (Miss. 2008), cert. denied, 555 U.S. 1188, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 2009 U.S. LEXIS 1379 (U.S. 2009).

Defendant argued that the jury's verdict of not guilty to the charge of capital murder also acquitted her of any underlying and lesser-included offenses, and that she should have been discharged as a matter of law and pursuant to the prohibition against double jeopardy; however, Miss. Code Ann. § 99-19-5(1) allowed a jury to find a defendant guilty of inferior offenses, the commission of which was necessarily included in the offense with which defendant was charged. Because murder was a lesser-included offense of capital murder, the trial court did not err in accepting a verdict of guilty of murder and defendant's double jeopardy rights were not violated. Colburn v. State, 990 So. 2d 206, 2008 Miss. App. LEXIS 74 (Miss. Ct. App. 2008).

Because defendant's actions clearly arose to an aggravated assault, the evidence did not support the giving of a lesser-included offense instruction on simple assault; the evidence showed that defendant caused serious bodily injury under such circumstances manifesting extreme indifference to the value of human life. Downs v. State, 962 So. 2d 1255, 2007 Miss. LEXIS 444 (Miss. 2007).

Elements for the charge of sale of cocaine as listed in Miss. Code Ann. § 41-29-139 were necessarily included to prove the crime of sale of cocaine while in possession of a firearm under Miss. Code Ann. § 41-29-152, as § 41-29-152 simply provided for an enhanced penalty for the commission of a crime under § 41-29-139, but it was still necessary that each element of the charged offense under § 41-29-139 be proven; the jury was properly instructed that defendant could be found guilty of sale of cocaine, a lesser-included offense to the charge of sale of cocaine while in possession of a firearm, and thus pursuant to Miss. Code Ann. § 99-19-5(1), there was no merit to the argument that the indictment against was not valid because a lesser-included offense was not stated. Davis v. State, 950 So. 2d 1073, 2007 Miss. App. LEXIS 125 (Miss. Ct. App. 2007).

Court of appeals erred when it reversed defendant's conviction for molestation where molestation was a lesser included offense of sexual battery; defendant's actions were done with the purpose of gratifying his lust, and the victim was under the age of 14 at the time of the incident, and defendant's acts of grabbing the victim, touching her genital area, and touching himself, demonstrated that he was gratifying his lust, and intent could be inferred from a defendant's actions. Friley v. State, 879 So. 2d 1031, 2004 Miss. LEXIS 1010 (Miss. 2004).

The misdemeanor offense of contributing to neglect of a child in violation of Miss. Code Ann. § 97-5-39(1) was not a lesser included offense of felony child abuse in violation of Miss. Code Ann. § 97-5-39(2), but was a lesser nonincluded offense as the same facts would have supported both charges; defendant charged with only the felony offense waived any objection based on the giving of the misdemeanor instruction as defendant not only failed to object to the giving of the instruction but had requested it be given. Moore v. State, 799 So. 2d 89, 2001 Miss. LEXIS 276 (Miss. 2001).

Decision that the directed verdict on the charge listed in the indictment acted as directed verdict as to all lesser-included offenses of that charge unless the lesser offenses were pleaded in the indictment did not nullify Miss. Code Ann. § 99-19-5, allowing a jury to find guilt of any inferior offense the commission of which was necessarily included in the offense charged. Fulcher v. State, 805 So. 2d 556, 2000 Miss. App. LEXIS 593 (Miss. Ct. App. 2000).

If there is a court-directed verdict as to the principal offense, the court cannot thereafter instruct the jury on a lesser included offense that was not alleged in the indictment. Fulcher v. State, 2000 Miss. App. LEXIS 570 (Miss. Ct. App. Dec. 12, 2000), op. withdrawn, sub. op., 805 So. 2d 556, 2000 Miss. App. LEXIS 593 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault, the court properly instructed the jury with regard to simple assault as a lesser included offense where the state presented a witness claiming there was serious bodily injury and the defense brought forth a witness that the injuries were not serious. Odom v. State, 767 So. 2d 242, 2000 Miss. App. LEXIS 151 (Miss. Ct. App. 2000).

In first-degree murder case, where trial court instructed on second-degree murder but did not require jury to agree on single theory of first-degree murder, defendant was not entitled as matter of due process to instruction on lesser included offense of robbery, where (a) jury had been instructed on lesser offense of second-degree murder as alternative to either finding guilt of first-degree murder or acquitting defendant, and (b) evidence would have supported second-degree murder conviction; due process concern with eliminating distortion of fact-finding process, which is created when jury is faced with all-or-nothing choice between murder and innocence, was not implicated. Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555, 1991 U.S. LEXIS 3631 (U.S. 1991).

Under the constitutions of both the United States and the State of Mississippi and under this section, a jury instruction on child fondling should not have been given where the indictment charged only forcible rape since child fondling is not a necessarily included offense of forcible rape and, therefore, the indictment did not sufficiently notify the defendant that he might face a charge of child fondling. Hailey v. State, 537 So. 2d 411, 1988 Miss. LEXIS 632 (Miss. 1988).

The fact that a defendant has been indicted for capital murder does not preclude the trial court's giving instructions on lesser-included offenses of murder and manslaughter where, under the evidence, a reasonable jury could find the defendant not guilty of capital murder but guilty of one of the lesser-included offenses. Harveston v. State, 493 So. 2d 365, 1986 Miss. LEXIS 2589 (Miss. 1986).

A simple assault is a constituent or lesser included offense of aggravated assault. Callahan v. State, 419 So. 2d 165, 1982 Miss. LEXIS 2120 (Miss. 1982).

In a prosecution for robbery, it was not error for the trial court to refuse the defendant's requested instruction on the lessor included offense of assault and battery where the requested instruction ignored the charge of robbery and the evidence supporting that charge, and the evidence in the case was such that no fair-minded jury could have reached any other conclusion than that the defendant was guilty of robbery beyond a reasonable doubt. Presley v. State, 321 So. 2d 309, 1975 Miss. LEXIS 1530 (Miss. 1975).

The charge of possession and delivery of marijuana is a constituent part of the charge of the sale of marijuana. Jones v. State, 279 So. 2d 650, 1973 Miss. LEXIS 1490 (Miss. 1973).

Under the provisions of Code 1942, § 2523, a defendant indicted for armed robbery may properly be tried and convicted for robbery. Auman v. State, 271 So. 2d 427, 1973 Miss. LEXIS 1508 (Miss. 1973).

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. Vickers v. State, 215 So. 2d 432, 1968 Miss. LEXIS 1364 (Miss. 1968).

Where indictment attempting to charge defendant with felonious commission of the act constituting a third offense was void in its entirety for failure to charge his conviction of a first offense as a first offense, and his conviction of a second offense as a second offense, all under the same statute (Code 1942, § 2613, dealing with unlawful acts with regard to intoxicating liquors), trial court erred in failing to sustain demurrer thereto and in permitting amendment of indictment so as to charge a first offense; and no effect could be given such indictment under this section [Code 1942, § 2523], authorizing a conviction for the commission of some other offense, the commission of which is necessarily included in the offense with which the defendant is charged in the indictment, since it neither charged a third offense nor any constituent offense. Ainsworth v. State, 206 Miss. 559, 40 So. 2d 298, 1949 Miss. LEXIS 283 (Miss. 1949).

Where the evidence would justify a conviction of murder, the defendant may not complain of a conviction of the lesser offense of manslaughter, nor of an instruction covering such offense. Huffman v. State, 192 Miss. 375, 6 So. 2d 124, 1942 Miss. LEXIS 23 (Miss. 1942).

In prosecution under indictment charging robbery with deadly weapon accused could be found guilty of robbery without firearms under statute providing accused may be found guilty of lesser offense or other offense necessarily included in offense charged. Bogan v. State, 176 Miss. 655, 170 So. 282, 1936 Miss. LEXIS 166 (Miss. 1936).

Assault with intent is not within statutory indictment for murder. Bell v. State, 149 Miss. 745, 115 So. 896, 1928 Miss. LEXIS 84 (Miss. 1928).

An indictment held not defective for failure to properly charge intent to kill and murder, where the conviction was only for assault and battery. Bailey v. State, 146 Miss. 588, 111 So. 586, 1927 Miss. LEXIS 203 (Miss. 1927).

The statutory indictment for murder does not include an assault and battery with intent to murder and a conviction of the latter thereunder is not warranted. Scott v. State, 60 Miss. 268, 1882 Miss. LEXIS 48 (Miss. 1882).

The statutory indictment for murder does not include an assault and battery and a conviction of the latter under such an indictment is not warranted. Moore v. State, 59 Miss. 25, 1881 Miss. LEXIS 67 (Miss. 1881).

Under an indictment for an assault with intent to kill and murder, the accused may be convicted of an assault. Bedell v. State, 50 Miss. 492, 1874 Miss. LEXIS 82 (Miss. 1874).

4. Lesser nonincluded offenses.

This statute and the Mississippi Supreme Court's precedential interpretation of it consistent with Hailey v. State, 537 So. 2d 411 (Miss. 1988), and similar cases governs what lesser offenses may be charged to the jury. Therefore, in a capital murder case, there was no error in refusing to instruct the jury on lesser-nonincluded-offenses. (overruling Griffin v. State, 533 So. 2d 444 (Miss. 1988)). Hye v.

State, 162 So. 3d 750, 2015 Miss. LEXIS 69 (Miss. 2015).

Where a defendant had been indicted for violating Miss. Code Ann. § 97-17-33, the State was not entitled to lesser-included jury instruction for accessory after the fact. Only a defendant, not the State could request a lesser-included offense instruction, and accessory after the fact was not a lesser-included offense to burglary. Hall v. State, 127 So. 3d 202, 2013 Miss. LEXIS 649 (Miss. 2013).

Where defendant was indicted for sexual battery, it was not plain error for the trial court to convict defendant of the crime of touching and handling a child for lustful purposes; unlawful touching was not a lesser-included offense of sexual battery, however, unlike in Friley v. State; not only did defendant not object to the lesser offense instruction, defendant offered an instruction on the form of verdict that asked the jury to determine whether defendant was guilty of the lesser crime of touching and handling a child for lustful purposes. Dupuis v. State, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. State v. Shaw, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), op. withdrawn, sub. op., 880 So. 2d 296, 2004 Miss. LEXIS 1027 (Miss. 2004).

The misdemeanor offense of contributing to neglect of a child in violation of Miss. Code Ann. § 97-5-39(1) was not a lesser included offense of felony child abuse in violation of Miss. Code Ann. § 97-5-39(2), but was a lesser nonincluded offense as the same facts would have supported both charges; defendant charged with only the felony offense waived any objection based on the giving of the misdemeanor instruction as defendant not only failed to object to the giving of the instruction but had requested it be given. Moore v. State, 799 So. 2d 89, 2001 Miss. LEXIS 276 (Miss. 2001).

Trial court properly granted defendant's request for lesser offense instruction on disorderly conduct, even though defendant had not been indicted for disorderly conduct and disorderly conduct was not a lesser included offense of simple assault; defendant argued that the most he could be guilty of was disorderly conduct, and he was entitled to have the jury instructed as to his theory of defense. Williams v. State, 797 So. 2d 372, 2001 Miss. App. LEXIS 243 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 A.L.R.4th 118.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 A.L.R.4th 91.

Law Reviews.

Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

§ 99-19-7. Verdict as to some, disagreement as to other defendants.

On the trial of two or more persons jointly indicted, the jury may render a verdict of guilty or not guilty as to some and disagree and be discharged as to others, without a verdict, if they cannot agree as to all; and the case of those as to whom a verdict was not found shall stand as if it had not been submitted to a jury, and shall be tried accordingly before another jury.

HISTORY: Codes, 1880, § 3079; 1892, § 1427; 1906, § 1500; Hemingway's 1917, § 1258; 1930, § 1281; 1942, § 2524.

Cross References — Verdicts and disagreements, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

Verdicts, see MRCrP 24.1 through 24.6.

§ 99-19-9. No special form of verdict required.

No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.

HISTORY: Codes, 1906, § 762; Hemingway's 1917, § 565; 1930, § 574; 1942, § 1518.

Cross References — Another section derived from same 1942 Code section, see § 11-7-157.

Verdict may be reformed at the bar if informal or defective, see § 99-19-11.

JUDICIAL DECISIONS

1. In general.

It was not deficient performance on the defense counsel's part to fail to object to the form of the verdict because the verdict could be understood in a reasonably clear manner and, as such, would not be reversed just because it was a poor translation of the jury instructions. Jordan v. State, 912 So. 2d 800, 2005 Miss. LEXIS 170 (Miss. 2005).

Verdict finding defendant guilty as "accessor to the crime" was too vague, uncertain and indefinite to support a conviction of grand larceny, where the evidence pointed strongly to another who actually took the money, since it could not be ascertained whether the jury meant, by "accessor," that defendant was guilty as accessor before or after the larceny or that the defendant had received the money from another knowing it to have been stolen; and the defects of the verdict were not cured by statute pertaining to jeofails. McDougal v. State, 199 Miss. 39, 23 So. 2d 920, 1945 Miss. LEXIS 268 (Miss. 1945).

Ordinarily, a verdict is sufficient in form if it expresses the intent of the jury so that the court can understand it. Wilson v. State, 197 Miss. 17, 19 So. 2d 475, 1944 Miss. LEXIS 269 (Miss. 1944).

Verdict in criminal prosecution, "We the jury agree that the defendant is guilty as charged," is sufficient in form. Wilson v. State, 197 Miss. 17, 19 So. 2d 475, 1944 Miss. LEXIS 269 (Miss. 1944).

RESEARCH REFERENCES

Am. Jur.

75A Am. Jur. 2d, Trial § 1545

CJS.

89 C.J.S., Trial §§ 981-988.

§ 99-19-11. Verdict may be reformed at the bar if informal or defective.

If the verdict is informal or defective the court may direct it to be reformed at the bar.

HISTORY: Codes, 1906, § 779; Hemingway's 1917, § 562; 1930, § 571; 1942, § 1515.

Cross References — Another section derived from same 1942 Code section, see § 11-7-159.

Defective verdicts, see Miss. Unif. Cir. & County Ct. Prac. R. 3.10.

Defective verdicts, see MRCrP 24.6.

JUDICIAL DECISIONS

1. In general.

Trial court properly instructed the jury to reform its verdict to comply with the jury instructions regarding form. Evans v. State, 226 So. 3d 1, 2017 Miss. LEXIS 249 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

Initial return of separate but consistent verdicts, and the subsequent unanimous verdict for felony aggravated domestic violence after the trial judge instructed the jurors to return to deliberation, re-read the instructions, and return a verdict in the proper form, were properly attained. Lewis v. State, 215 So. 3d 994, 2017 Miss. App. LEXIS 182 (Miss. Ct. App. 2017).

Trial court did not err in failing to grant a mistrial after the jury returned two separate verdicts, as the judge redirected the jury's attention to the instruction emphasizing there could be only one verdict and instructed the jury to resume deliberations until a unanimous decision as to one form of the verdict was reached, and the jury returned five minutes later with a verdict finding defendant guilty of burglary of a dwelling Clay v. State, 881 So. 2d 323, 2004 Miss. App. LEXIS 859 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 96 (Miss. 2005).

Where a jury trying a defendant had announced, in open court, that it had arrived at a verdict, which was handed to the clerk and as read found the defendant guilty as charged, whereupon one of the jurors mistakenly advised the court that the verdict was incorrect, and the word "not" was inserted in the verdict, but before the jury had adjourned, the court, being advised that amended verdict was wrong, ordered the jury back to the jury room for further deliberations, and defendant was again found guilty, the court did not err in overruling defendant's motion for a new trial where it was shown that defendant's rights were not prejudiced by the occurrence. Anderson v. State, 231 Miss. 352, 95 So. 2d 465, 1957 Miss. LEXIS 519 (Miss. 1957).

Action of circuit court in permitting jury to reassemble and put its verdict in proper form before they had left courtroom or sight and presence of court was proper under this section [Code 1942, § 1515], where verdict was first returned, "We, jury, find the defendant guilty-charge," and was corrected to read, "We, the jury, find the defendant guilty as charged," and was signed by each member of jury. Serio v. Brookhaven, 208 Miss. 620, 45 So. 2d 257, 1950 Miss. LEXIS 279 (Miss. 1950).

RESEARCH REFERENCES

ALR.

Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated. 14 A.L.R.5th 89.

Propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after discharge or separation at conclusion of civil case. 19 A.L.R.5th 622.

Am. Jur.
75B Am. Jur. 2d, Trial §§ 1612, 1615.

CJS.
89 C.J.S., Trial §§ 1064, 1065-1072, 1074-1082.

§ 99-19-12. Repealed.

Repealed by Laws, 1998, ch. 358, § 5, eff from and after passage (approved March 16, 1998).

§ 99-19-12. [Laws, 1997, ch. 454, § 7, eff from and after passage (approved March 25, 1997)]

Editor's Notes — Former Section 99-19-12 provided for a pre-sentencing determination of a sexual offender's "sexual predator" status by the Sex Offender Advisory Board and actions taken thereon by the sentencing court.

§ 99-19-13. Mississippi Sentencing Disparity Task Force; purpose; composition.

(1) There is created the Mississippi Sentencing Disparity Task Force. The purpose of the task force is to study and report the existence of possible disparity in sentencing for crimes as documented by the Mississippi Department of Corrections in order to promote the interest of uniform justice throughout the State of Mississippi.

(2) The Mississippi Sentencing Disparity Task Force shall be composed of the following fourteen (14) members, who shall serve for two-year terms:

(a) Two (2) members of the Mississippi House of Representatives, appointed by the Speaker of the House;

(b) Two (2) members of the Mississippi State Senate, appointed by the Lieutenant Governor;

(c) Two (2) members appointed by the Governor;

(d) The Commissioner of the Mississippi Department of Corrections, or a designee;

(e) The Attorney General of the State of Mississippi, or his or her designee;

(f) The director of a faith-based organization involved in re-entry programs, or a designee appointed by the Lieutenant Governor;

(g) The Chief Justice of the Mississippi Supreme Court, or a designee;

(h) The Chairman of the Parole Board, or a designee;

(i) A person who is a former offender appointed by the Chairman of the Parole Board;

(j) The President of the Mississippi Prosecutors Association, or a designee; and

(k) A sentencing circuit or county court judge, or a designee to be appointed by the Chief Justice of the Mississippi Supreme Court.

(3) The Chief Justice of the Mississippi Supreme Court shall call the first meeting of the task force. The task force shall hold its first meeting no later

than thirty (30) days after July 1, 2018. At its first meeting, the task force shall elect a chairman and vice chairman from its membership and adopt rules for transacting its business and keeping records. The chairman and vice chairman shall serve one-year terms or until such time as a successor is elected.

HISTORY: Laws, 2018, ch. 416, § 8, eff from and after July 1, 2018.

Editor's Notes — A former § 99-19-13 [Codes, 1880, § 3083; 1892, § 1439; 1906, § 1512; Hemingway's 1917, § 1270; 1930, § 1293; 1942, § 2536; Repealed by Laws, 1974, ch. 576, § 9, eff from and after passage (approved April 23, 1974)] was entitled: Sentence; capital cases.

§ 99-19-15. Sentence; felon under age sixteen.

When the court shall be satisfied that a person who has been found guilty of a felony not capital is not more than sixteen, the punishment imposed may, in the discretion of the court, be imprisonment in the county jail not exceeding one year, instead of imprisonment in the penitentiary.

HISTORY: Codes, 1880, § 3084; 1892, § 1440; 1906, § 1513; Hemingway's 1917, § 1271; 1930, § 1294; 1942, § 2537.

Cross References — Definition of "felony," see § 1-3-11.
Disposition Alternatives in delinquency cases, see § 43-21-605.
Office of Juvenile Correctional Institutions, see § 43-27-22.
Enforcement of sentence to county jail, see § 47-1-1.
Inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see Miss. R. Evid. 1101.
Sentencing, see MRCrP 26.4 through 26.8.

JUDICIAL DECISIONS

1. In general.

Under this section [Code 1942, § 2537] the trial judge has the discretion in a felony case against a defendant not over sixteen years of age to imprison him in the county jail as much as one year instead of sending him to the penitentiary. Kidd v. State, 137 Miss. 419, 102 So. 68, 1924 Miss. LEXIS 204 (Miss. 1924).

RESEARCH REFERENCES

ALR.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 872 et seq.

§ 99-19-17. Repealed.

Repealed by Laws, 2003, ch. 499, § 9, effective July 1, 2003.

§ 99-19-17. [Codes, 1892, § 1441; Laws, 1906, § 1514; Hemingway's 1917, § 1272; Laws, 1930, § 1295; Laws, 1940, ch. 241; Laws, 1942, § 2538; Laws, 1970, ch. 346, § 1; Laws, 1993, ch. 359 § 4, eff from and after July 1, 1993.]

Editor's Notes — Former § 99-19-17 was entitled: Sentence; when obtaining money under false pretenses and embezzlement may be punished as petit larceny.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Instructions to jury.

1. In general.

Evidence was insufficient to support finding beyond reasonable doubt that value of stolen property was in excess of $100; therefore, defendant should have been sentenced for offense of petit larceny, where in affidavit sworn out in justice court, value of property was set at $90, while at trial testimony regarding value of stolen property was inconsistent. Dulin v. State, 507 So. 2d 897, 1987 Miss. LEXIS 2244 (Miss. 1987).

Evidence that stolen postal money orders had been completed in an aggregate amount of $200 and were negotiable was sufficient to justify a finding and sentence for a felony under this section [Code 1942, § 2538]. Chavers v. State, 215 So. 2d 880, 1968 Miss. LEXIS 1385 (Miss. 1968).

An indictment charging embezzlement of gasoline credit cards is not void for failing to state the value of the cards, but where the value of the embezzled property is neither stated nor proved the offense is punishable as petit larceny and not as a felony. Bell v. State, 251 Miss. 511, 170 So. 2d 428, 1965 Miss. LEXIS 877 (Miss. 1965).

Where defendant was punished under a statute providing generally for punishment upon conviction of receiving stolen goods and the indictment charged receipt of stolen property alleging the value of $21, the defendant should have been sentenced under statute providing for punishment of such offense as petit larceny. Jones v. State, 215 Miss. 355, 60 So. 2d 805, 1952 Miss. LEXIS 573 (Miss. 1952).

This section [Code 1942, § 2538] and Code 1942, § 2249 are inconsistent, and since the legislature has seen fit to amend this section [Code 1942, § 2538] such section is controlling as the last pronouncement of the legislature. Crowell v. State, 195 Miss. 427, 15 So. 2d 508, 1943 Miss. LEXIS 158 (Miss. 1943).

One convicted of receiving stolen property, consisting of an automobile tire of the value of less than $25, cannot be sentenced to a term in the state penitentiary but can only be punished as for petit larceny. Crowell v. State, 195 Miss. 427, 15 So. 2d 508, 1943 Miss. LEXIS 158 (Miss. 1943).

Under this section [Code 1942, § 2538] where the value is not shown to be above the limit stated therein, the defendant should be convicted of petit larceny only. Wheeler v. State, 76 Miss. 265, 24 So. 310, 1898 Miss. LEXIS 84 (Miss. 1898).

2. Instructions to jury.

This section does not require that a defendant indicted for embezzlement of property valued at less than $ 250 have the jury instructed with regard to petit larceny as a lesser included offense; this section affects only the sentence of a convicted defendant, not the crime for which he is charged or on which a jury is instructed. Bishop v. State, 755 So. 2d 1269, 2000 Miss. App. LEXIS 65 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

§ 99-19-18. Mandatory minimum sentence for embezzlement or other unlawful conversion of public funds.

When any person is convicted of a felony or felonies in which public funds in the amount of Ten Thousand Dollars ($10,000.00) or more were unlawfully taken, obtained or misappropriated, the sentence imposed by the court shall include a minimum term of imprisonment of one (1) year in the custody of the Department of Corrections. Notwithstanding any other law to the contrary, such mandatory minimum term shall not be reduced or suspended nor shall such person be eligible for probation or parole before the expiration of one (1) year of incarceration.

HISTORY: Laws, 2002, ch. 309, § 1, eff from and after July 1, 2002.

Cross References — Unlawful conversion of public funds by officers, trustees and public employees, see § 97-11-25.

Embezzlement, generally, see §§ 97-23-19 et seq.

§ 99-19-19. Repealed.

Repealed by Laws, 1979, ch. 501, § 4, eff from and after April 18, 1979.

§ 99-19-19. [Codes, Hutchinson's 1848, ch. 65, art. 2(56); 1857, ch. 64, art. 310; 1871, § 2811; 1880, § 3086; 1892, § 1443; 1906, § 1516; Hemingway's 1917, § 1274; 1930, § 1297; 1942, § 2540]

Editor's Notes — Former § 99-19-19 was entitled: Sentence; convict committed until fine and costs paid.

§ 99-19-20. Sentence; imposition of fine; payment; imprisonment for nonpayment; indigent defendants.

(1) Except as otherwise provided under Section 99-19-20.1, when any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.

(2) Except as otherwise provided under Section 99-19-20.1, the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

This subsection shall be limited as follows:

(a) In no event shall such period of imprisonment exceed one (1) day for each One Hundred Dollars ($100.00) of the fine.

(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

(c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

HISTORY: Laws, 1979, ch. 501, § 1; Laws, 1998, ch. 380, § 1; Laws, 2010, ch. 492, § 4, eff from and after passage (approved Apr. 7, 2010); Laws, 2018, ch. 416, § 2, eff from and after July 1, 2018.

Cross References — Utilization of a program of public service in the implementation of the provisions of this section, see § 21-23-7.

Imposition of fine on persons convicted of offenses punishable by more than 1 year of imprisonment, see § 99-19-32.

Fines, see MRCrP 26.6.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general
2.-5. [Reserved for future use].

II. UNDER FORMER LAW.

6. In general.

I. UNDER CURRENT LAW.

1. In general

Trial court erred in finding that appellant violated the terms of his probation for failure to pay courts costs because there were no facts and circumstances that established he more likely than not violated any of the other terms of his post-release supervision; since the trial court did not inquire as to the reason appellant had not paid his court costs, his revocation could not be legally predicated on his failure to pay those costs, as he could have been financially unable to do so. Gray v. State, 269 So. 3d 331, 2018 Miss. App. LEXIS 185 (Miss. Ct. App. 2018).

Trial court did not err by revoking post-release supervision because the probationer, upon the probationer's release became gainfully employed and, as the probationer admitted, was making enough money to pay the costs and fines levied against the probationer, and could pay, as well, a monthly sum toward costs of the probationer's supervision, as the probationer was ordered to do. However, the probationer did not pay the costs and the fines. Ross v. State, 122 So. 3d 136, 2013 Miss. App. LEXIS 626 (Miss. Ct. App. 2013).

Probationer had to pay a fine immediately and/or the fine was a condition of probation because no installment plan was set up. Ross v. State, 122 So. 3d 136, 2013 Miss. App. LEXIS 626 (Miss. Ct. App. 2013).

Defendant's murder conviction was proper because his assertions that he was illegally detained were without merit; after he was convicted of three misdemeanor charges, he was unable to pay his fine and was rightfully detained in lieu of payment pursuant to Miss. Code Ann. § 99-19-20. Bailey v. State, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App.), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Defendant asserted that pursuant to Miss. Code Ann. § 99-19-20, because he was indigent, he was wrongfully incarcerated for violating the terms of his probation. However, the record showed that if he was indigent, it was because he had recently been fired from his job for accruing more than $ 5,000 in company credit card charges in violation of his employer's policy, and in fact, at the revocation hearing, he had testified that he did have income for restitution payments; thus, the trial judge did not abuse his discretion in determining that defendant was able to make restitution payments and that his probation should be revoked. Baldwin v. State, 891 So. 2d 274, 2004 Miss. App. LEXIS 1036 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 198 (Miss. 2005).

The statute does not authorize a court to order that no good time or other credit be allowed on a sentence until arrangements are made for the payment of a fine and restitution. Haynes v. State, 811 So. 2d 283, 2001 Miss. App. LEXIS 12 (Miss. Ct. App. 2001).

When failure to pay court-imposed fines becomes a possible basis for a probation revocation, the trial court must follow the procedural mandates of subsection (2) of this section and Berdin v. State, 648 So. 2d 73, 1994 Miss. LEXIS 637 (Miss. 1994), overruled, Smith v. State, 742 So. 2d 1146, 1999 Miss. LEXIS 260 (Miss. 1999).

A defendant was deprived of due process by a trial court's failure to conduct an inquiry as to the reason she was delinquent in paying her probation fines before revoking her probation because of her failure to pay those fines. Berdin v. State, 648 So. 2d 73, 1994 Miss. LEXIS 637 (Miss. 1994), overruled, Smith v. State, 742 So. 2d 1146, 1999 Miss. LEXIS 260 (Miss. 1999). But see Smith v. State, 742 So. 2d 1146, 1999 Miss. LEXIS 260 (Miss. 1999).

When a circuit court makes release from prison contingent upon payment of a fine, it is mandatory that the circuit court follow the statutory requirements of subsection (2) of this section; the court must make an inquiry as to whether the convicted defendant is in fact able to pay the fine, and make a finding on this question. As to the financial condition of an incarcerated prisoner years hence, the State is not without resources to collect a tax, a debt or a fine from a debtor who is not judgment proof. Jones v. State, 564 So. 2d 848, 1990 Miss. LEXIS 292 (Miss. 1990).

A defendant's equal protection challenge to his sentence of 14 years in the state penitentiary with 7 years suspended if he paid a $125,000 fine was premature because there was nothing in the record showing the defendant to be indigent. Arnett v. State, 532 So. 2d 1003, 1988 Miss. LEXIS 457 (Miss. 1988).

If, after a defendant has completed his sentence, the Department of Corrections attempts to keep him incarcerated for failure to pay a fine, then the trial court must determine at that time whether he is financially able to pay the fine and, if not, must consider and apply one of the alternatives to imprisonment set out in this section. Lee v. State, 457 So. 2d 920, 1984 Miss. LEXIS 1928 (Miss. 1984).

Under this section, a defendant could not be imprisoned for failure to pay a lawfully imposed fine, where he was financially unable to do so and the trial court so found; moreover, the trial court had no authority to alter defendant's $45,000 fine; however, the court could require defendant to perform public service, or it could establish a realistic installment plan for the payment of the fine. Cassibry v. State, 453 So. 2d 1298, 1984 Miss. LEXIS 1841 (Miss. 1984).

2.-5. [Reserved for future use].

II. UNDER FORMER LAW.

6. In general.

The trial court did not err in committing the defendant to jail for nonpayment of a fine, where, by the imposition of the fine of $100, the defendant could never have been required to remain in jail longer than 90 days which was the statutory maximum period of confinement for the crime of which convicted. McKinney v. State, 260 So. 2d 444, 1972 Miss. LEXIS 1559 (Miss. 1972).

A violation of the equal protection clause of the Fourteenth Amendment inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term, and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine, for the constitution prohibits the state from imposing a fine as a sentence and then converting it into a jail term because the defendant is unable to pay the fine in full forthwith. Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130, 1971 U.S. LEXIS 74 (U.S. 1971).

The imprisonment of an indigent, convicted of nine traffic offenses which were punishable by fines only, for inability to pay the fines totalling $425, constituted an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130, 1971 U.S. LEXIS 74 (U.S. 1971).

Under the equal protection clause of the Fourteenth Amendment an indigent, convicted in a state court and sentenced to a maximum term of imprisonment specified by statute and payment of fine or court costs, and the judgment also directing, pursuant to statute, that if the defendant was in default of the monetary payment at the expiration of his imprisonment term he should remain in jail to "work off" the monetary obligation at the statutory rate of $5 per day, may not be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence, either with regard to the fine or with regard to the costs (holding unconstitutional § 1-7(k) of the Illinois Criminal Code of 1961). Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586, 1970 U.S. LEXIS 8 (U.S. 1970).

A person convicted of murder and sentenced to life imprisonment is not liable for the costs. State v. Burt, 103 Miss. 755, 60 So. 773, 1912 Miss. LEXIS 227 (Miss. 1912).

A case in which a sentence of $500 and ninety days in jail provided that on payment of $300 the fine and jail sentence be suspended on good behavior and that defendant stand committed until the remainder of the fine and costs are paid the defendant was not relieved of the imprisonment on failure to pay the fine. Buck v. State, 103 Miss. 276, 60 So. 321, 1912 Miss. LEXIS 170 (Miss. 1912).

OPINIONS OF THE ATTORNEY GENERAL

Court may condition probation on payment of fine, and may imprison defendant until fine is paid, if court finds that defendant is financially able to pay fine. Nash, Sept. 23, 1992, A.G. Op. #92-0736.

Subsection (2)(a) of this section puts limitation on time for which person can be imprisoned for contempt for refusing to pay fine when financially able to do so; although it puts limit on time of imprisonment, it does not create credit against fine for time served; for example, if person were fined $100 and served 10 days for refusing to pay, although able to do so, then after 10 days prisoner would have to be released. Stewart, May 20, 1993, A.G. Op. #93-0255.

Credit may be earned while incarcerated pursuant to this section for willful non-payment of fines; if defendant is sentenced to fine, defendant may also be allowed to work off fine minimum wage pursuant to subsections (1)(d) and (2)(c) of this section. Stewart, May 20, 1993, A.G. Op. #93-0255.

Section 19-3-41 empowers county board of supervisors to contract with private collection agency or attorney to collect outstanding fines and Section 99-19-20 does not forbid use of collection agency or attorney to collect delinquent fines. Smith, March 18, 1994. A.G. Op. #93-0863.

If a defendant fails to make payments on his fine as agreed, then a warrant may be issued to have the defendant brought before the court to show cause why he should not be held in contempt. See Section 99-19-20. Spencer, August 2, 1996, A.G. Op. #96-0493.

This section sets forth sentencing alternatives which may be used by a justice court judge when considering how a defendant should be sentenced. The court may set up installment payments from a defendant if the judge determines a need for such action. There is no set amount of time that is standard for the payment of fines and the judge should use her discretion in determining such payments. Hatfield, August 16, 1996, A.G. Op. #96-0552.

Where a municipal court sentences a defendant to a work program, the defendant is entitled to be credited at the current federal minimum wage for any fine imposed; furthermore, an indigent defendant may be sentenced to a work program in lieu of a fine. Austin, Aug. 1, 1997, A.G. Op. #97-0472.

Where a defendant owes a $250.00 fine but refuses to pay it, he can be sent to jail under this section; however, jail time under this section is limited to 10 days (one day for each $25.00 of the fine). If the defendant chooses to work during those 10 days, his fine will be reduced by $10.00 a day under § 47-1-47 and, at the end of the 10 days, the defendant will have to be released, but will still owe $150.00 in fines. Thornton, May 29, 1998, A.G. Op. #98-0306

The statute provides for alternative sentencing in the event a defendant is unable to pay a fine, i.e. payment of fine over time, or is sentenced to a work program to work off the amount of the fine; however, there is no authority to add state assessments to a violation of a county ordinance. Glenn, May 19, 2000, A.G. Op. #2000-0215.

Miss. Code Section 99-19-20 provides that when person is sentenced to pay fine without imprisonment and ordered to perform work on public property for public benefit as payment of that fine, then credit shall be earned at federal minimum wage rate. Simmons, Jan. 11, 1993, A.G. Op. #92-0988.

A judge may not order "house arrest" under the provisions of Section 99-19-20. Bruni, Dec. 15, 2006, A.G. Op. 06-0608.

RESEARCH REFERENCES

ALR.

Right to apply cash bail to payment of fine. 92 A.L.R.2d 1084.

Indigency of offender as affecting validity or imprisonment as alternative to payment of fine. 31 A.L.R.3d 926.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 A.L.R.4th 1069.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

Downward departure under state sentencing guidelines permitting downward departure for defendants with significantly reduced mental capacity, including alcohol or drug dependency. 113 A.L.R.5th 597.

Law Reviews.

1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

§ 99-19-20.1 Nonpayment of fine, restitution or court costs not automatically followed by incarceration; indigent defendants.

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars ($10,000.00) in

tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85-3-1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.

(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.

(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

(4) A minor who is to serve as a confidential informant must be notified that the minor has the right to contact one (1) or both parents.

HISTORY: Laws, 2018, ch. 416, § 1, eff from and after July 1, 2018.

§ 99-19-21. Sentence; prison terms to run consecutively or concurrently in discretion of court; sentence for felony committed while on parole, probation, earned-release or post-release supervision, or suspended sentence.

(1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

(2) When a person is sentenced to imprisonment for a felony committed while the person was on parole, probation, earned-release supervision, post-release supervision or suspended sentence, the imprisonment shall commence at the termination of the imprisonment for the preceding conviction. The term of imprisonment for a felony committed during parole, probation, earned-

release supervision, post-release supervision or suspended sentence shall not run concurrently with any preceding term of imprisonment. If the person is not imprisoned in a penitentiary for the preceding conviction, he shall be placed immediately in the custody of the Department of Corrections to serve the term of imprisonment for the felony committed while on parole, probation, earned-release supervision, post-release supervision or suspended sentence.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8(11); 1857, ch. 64, art. 354; 1871, § 2861; 1880, § 3110; 1892, § 1459; 1906, § 1532; Hemingway's 1917, § 1294; 1930, § 1319; 1942, § 2567; Laws, 1942, ch. 301; Laws, 1983, ch. 333; Laws, 1995, ch. 596, § 14, eff from and after June 30, 1995.

Cross References — Probation and parole generally, see § 47-7-1 et seq.
Sentencing, see MRCrP 26.4 through 26.8.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Felony while on parole.
3. Felony while on probation.
4. Consecutive sentences.
5. Post-release supervision.

1. In general.

Mississippi Department of Corrections erroneously was having defendant serve his kidnapping sentence before his manslaughter sentence because that was contrary to the unambiguous language of the circuit court's sentencing order; instead of defendant serving his manslaughter sentence first, for which he could be eligible for trusty time and meritorious earned time, he was serving his kidnapping sentence, which was a mandatory, day-for-day sentence. Thomas v. Miss. Dep't of Corr., 248 So. 3d 786, 2018 Miss. LEXIS 129 (Miss. 2018).

Defendant failed to demonstrate that the trial court imposed any sentence upon his convictions for armed robbery that exceeded the statutory maximum, because the trial court was not required to consider whether he had time to serve on another sentence any more than it was required to consider the sentences imposed on separate counts within the same conviction. Myers v. State, 153 So. 3d 581, 2014 Miss. LEXIS 446 (Miss. 2014).

Defendant's sentence was affirmed because the trial judge was well within his authority in Miss. Code Ann. § 99-19-21 to impose concurrent or consecutive sentences, and pursuant to Miss. Code Ann. § 99-7-2(3), the court could impose separate sentences for each of his sexual battery of a minor convictions under Miss. Code Ann. § 97-3-95(1)(d). Eason v. Epps, 32 So. 3d 538, 2009 Miss. App. LEXIS 723 (Miss. Ct. App. 2009).

Trial court did not violate Miss. Code Ann. § 99-19-21(1) by combining concurrent robbery sentences with a consecutive armed robbery sentence to create a 20-year sentence because, under the statute, the trial court was allowed to require that the sentences be served concurrently or consecutively. Caviness v. State, 1 So. 3d 917, 2008 Miss. App. LEXIS 575 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 151 (Miss. 2009).

In a drug case, two eight-year sentences imposed for drug charges were not ambiguous; the sentences imposed from the two indictments mirrored each other, and the trial court was allowed to order them to all run concurrently under Miss. Code Ann. § 99-19-21(1); defendant was eligible for release at the expiration of the longest term. Heafner v. State, 947 So. 2d 354, 2007 Miss. App. LEXIS 17 (Miss. Ct. App. 2007).

In a case where defendant was convicted of three counts of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23, defendant's three 10-year consecutive sentences under Miss. Code Ann. § 99-19-21 were not disproportionate to defendant's crimes, were within the limits set by statute, and did not violate the Eighth Amendment. Mingo v. State, 944 So. 2d 18, 2006 Miss. LEXIS 679 (Miss. 2006).

Inmate's non-mandatory sentences were given prior to his sentences as a habitual offender, and in order to comply with Miss. Code Ann. § 99-19-21, the inmate was required to finish serving his non-mandatory sentences before he could begin serving his mandatory sentences; the Mississippi Department of Corrections had to be allowed to interpret its statutes in a manner that allowed the Mississippi Parole Board to impose an enhanced penalty for habitual offenders. Snow v. Johnson, 913 So. 2d 334, 2005 Miss. App. LEXIS 257 (Miss. Ct. App. 2005).

Trial court did not commit error when it imposed upon defendant a two-year sentence for escape under Miss. Code Ann. 97-9-49(1) where defendant was in jail awaiting trial for armed robbery when defendant escaped, force or violence was not required for the section to apply to an escape, as opposed to an "attempted escape", and it was within the discretion of the trial judge to impose consecutive sentences when defendant pled guilty to both crimes. Smith v. State, 868 So. 2d 1041, 2004 Miss. App. LEXIS 235 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion when it sentenced defendant; there was no basis for the appellate court to address defendant's request that she be granted a reduction of her state sentences or in the alternative a modification of her sentence to have it run concurrently with her five-year federal sentence. Stewart v. State, 845 So. 2d 744, 2003 Miss. App. LEXIS 436 (Miss. Ct. App. 2003).

Whether or not a sentence was to be served concurrently or consecutively was clearly within the discretion of the trial judge according to Miss. Code Ann. § 99-19-21(1); as such, defendant was properly sentenced on his escape charge along with the aggravated assault and kidnapping sentences. Coffey v. State, 856 So. 2d 635, 2003 Miss. App. LEXIS 589 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 596 (Miss. 2003).

On convictions for kidnapping and rape pursuant to §§ 97-3-53 and 97-3-65, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was therefore required to impose some lesser sentence than life, each sentence was to be imposed without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. Erwin v. State, 557 So. 2d 799, 1990 Miss. LEXIS 57 (Miss. 1990), but see Strahan v. State, 729 So. 2d 800, 1998 Miss. LEXIS 343 (Miss. 1998).

Consecutive sentences of 10 and 15 years imposed respectively for attempted rape and burglary of dwelling were permissible, even though both crimes arose out of same sequence of events and shared common element. Armstead v. State, 503 So. 2d 281, 1987 Miss. LEXIS 2364 (Miss. 1987).

In sentencing defendant convicted of rape to term of imprisonment to run concurrently with separate judgment of imprisonment for another rape in another county, second sentencing court is not required to consider sentence previously imposed. Harper v. State, 463 So. 2d 1036, 1985 Miss. LEXIS 1857 (Miss. 1985).

This section required that defendant's two separate sentences imposed for two separate convictions of burglary during two separate terms of the court be served consecutively. Tate v. State, 455 So. 2d 1312, 1984 Miss. LEXIS 1889 (Miss. 1984).

Defendant, who was convicted separately of two burglaries during two separate terms of the Circuit Court, was required to serve his two sentences consecutively, under this section, where the second sentencing order did not expressly provide that the sentences run concurrently, and where, at the time of sentencing, this section provided that, in the absence of language affirmatively indicating that sentences run concurrently, a second term did not begin until the first had been completed. Tate v. State, 455 So. 2d 1312, 1984 Miss. LEXIS 1889 (Miss. 1984).

A defendant who assaulted three police officers, on the same day and as a part of the same occurrence, was properly subjected to three separate charges of assault, in violation of § 97-3-7(1), and properly sentenced to three consecutive terms, pursuant to this section, for the three resulting convictions. Ball v. State, 437 So. 2d 423, 1983 Miss. LEXIS 2862 (Miss. 1983).

Three life sentences imposed on a defendant convicted of murder, rape, and kidnapping, were to run concurrently where each of the three sentencing orders, all dated March 25th, 1968, imposed a life sentence "commencing from this date." Watts v. Lucas, 394 So. 2d 903, 1981 Miss. LEXIS 1951 (Miss. 1981).

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under § 97-3-53 was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. Woods v. State, 393 So. 2d 1319, 1981 Miss. LEXIS 1904 (Miss. 1981).

Defendant's sentences for four separate convictions were to run consecutively and not concurrently since none of the four judgments specified how they were to run. Maycock v. Reed, 328 So. 2d 349, 1976 Miss. LEXIS 1793 (Miss. 1976).

This section [Code 1942, § 2567] requires that all sentences imposed by justices of the peace are to run consecutively rather than concurrently. Pickett v. Thomas, 209 So. 2d 192, 1968 Miss. LEXIS 1445 (Miss. 1968).

2. Felony while on parole.

Where the defendant was being sentenced for a felony he committed while on probation, he was not eligible to be sentenced to concurrent terms. Coleman v. State, 772 So. 2d 1101, 2000 Miss. App. LEXIS 588 (Miss. Ct. App. 2000).

3. Felony while on probation.

Trial court did not err in dismissing an inmate's motion for post-conviction relief on the ground that it was time-barred because although the inmate's claims regarding his alleged illegal sentence could be considered an exception to the statutory bar, and his sentence for manslaughter, which ran concurrently with his previous sentence, violated Miss. Code Ann. § 99-19-21(2), the concurrent sentence did not cause the inmate to suffer incarceration for a period of time longer than he was legally obligated; therefore, his claim was not an exception to the statutory bar because his sentence was illegally lenient and did not violate a fundamental right. Crosby v. State, 16 So. 3d 74, 2009 Miss. App. LEXIS 536 (Miss. Ct. App. 2009).

Defendant properly received consecutive sentences after he was caught selling cocaine while he was on post-release supervision for a conviction of a previous crime; when a convicted felon was sentenced for a crime he committed while he was on supervised release for committing a previous crime, the two sentences could not run concurrently, they had to run consecutively. Judge v. State, 933 So. 2d 1012, 2006 Miss. App. LEXIS 531 (Miss. Ct. App. 2006).

Inmate seeking post-conviction relief was not eligible to have his sentences run concurrently, because he committed the second offense while on probation. Johnson v. State, 909 So. 2d 1149, 2005 Miss. App. LEXIS 70 (Miss. Ct. App. 2005).

4. Consecutive sentences.

When arriving at an inmate's parole-eligibility date, the Mississippi Department of Corrections did not err in placing the minimum that the inmate had to serve on the inmate's later sentences consecutive to the minimum that the inmate had to serve on the inmate's earlier sentences, because the sentences could not be served concurrently. Brown v. State, 230 So. 3d 1069, 2017 Miss. App. LEXIS 156 (Miss. Ct. App. 2017).

Trial court had the discretion to order defendant's sentence for child exploitation to run consecutively to any other sentence he was currently serving. Triplett v. State, 207 So. 3d 1288, 2016 Miss. App. LEXIS 496 (Miss. Ct. App. 2016).

Defendant's 126-year sentence for selling cocaine, methamphetamine, and marijuana was not disproportionate to the crimes because the sentence was statutorily authorized, as (1) Miss. Code Ann. § 41-29-139(b)(1) and (3) permitted maximum sentences of 30 years and 3 years, (2) Miss. Code Ann. § 99-19-81 required a maximum sentence, as defendant was convicted of a third felony, (3) the doubling of each maximum sentence was authorized by Miss. Code Ann. § 41-29-147, based on defendant's prior drug conviction, and (4) Miss. Code Ann. § 99-19-21 authorized the court to order that the sentences run consecutively. Mosley v. State, 104 So. 3d 839, 2012 Miss. LEXIS 465 (Miss. 2012).

5. Post-release supervision.

Post-conviction relief was denied in a case where appellant inmate's post-release supervision (PRS) and suspended sentences were revoked because the inmate was on state PRS the moment that he was released from federal custody. Therefore, there was no error in revoking his PRS based on an arrest for drugs shortly after his release from federal custody. Lenoir v. State, 4 So. 3d 1056, 2008 Miss. App. LEXIS 585 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 122 (Miss. 2009).

RESEARCH REFERENCES

ALR.

Sentences by different courts as concurrent. 57 A.L.R.2d 1410.

Effect of invalidation of sentence upon separate sentence which runs consecutively. 68 A.L.R.2d 712.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 A.L.R.4th 960.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm. 55 A.L.R. Fed. 633.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 841 et seq.

CJS.

24 C.J.S., Criminal Law §§ 2181 et seq.

§ 99-19-23. Sentence; credit for time of prisoner's pre-trial or pre-appeal confinement.

The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

HISTORY: Codes, 1942, § 2540.5; Laws, 1968, ch. 382, § 1, eff from and after passage (approved April 11, 1968).

Cross References — Sentencing, see MRCrP 26.4 through 26.8.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Credit properly denied.
3. Credit awarded.

1. In general.

Circuit court did not err in sentencing defendant to forty years in prison for armed robbery in violation of Miss. Code Ann. § 97-3-79 because when the circuit judge announced the sentence, it simultaneously gave defendant credit for all of his pretrial custody time pursuant to Miss. Code Ann. § 99-19-23, which ultimately shortened defendant's announced sentence to under forty years. Foster v. State, 148 So. 3d 1045, 2013 Miss. App. LEXIS 135 (Miss. Ct. App. 2013), aff'd, 148 So. 3d 1012, 2014 Miss. LEXIS 514 (Miss. 2014).

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the inmate was not entitled to credit for time served in Tennessee. Phillips v. State, 25 So. 3d 404, 2010 Miss. App. LEXIS 23 (Miss. Ct. App. 2010).

An inmate is not entitled to credit for time served in Tennessee while he waited to enter his guilty plea and be sentenced in Mississippi. Phillips v. State, 25 So. 3d 404, 2010 Miss. App. LEXIS 23 (Miss. Ct. App. 2010).

Defendant argued that the trial court erred in failing to allow him to receive credit for time served in federal prison on an unrelated charge, but the trial court was correct in denying defendant credit for time served because he was already incarcerated for a separate charge while awaiting a trial in the state court matter. Bailey v. State, 19 So. 3d 828, 2009 Miss. App. LEXIS 722 (Miss. Ct. App. 2009).

Miss. Code Ann. § 99-19-23, which allowed credit for time served in another jurisdiction, did not apply to defendant's time served in another state. Waddell v. State, 999 So. 2d 375, 2008 Miss. App. LEXIS 93 (Miss. Ct. App. 2008).

Trial court correctly concluded that the inmate was not entitled to credit for time served while incarcerated in Alabama as punishment for a crime committed in that state, even though there were criminal charges pending against him in Mississippi during the entire period of his Alabama confinement; a prisoner actually serving time for another conviction was not, within the meaning of Miss. Code Ann. § 99-19-23. Stanley v. State, 850 So. 2d 154, 2003 Miss. App. LEXIS 439 (Miss. Ct. App. 2003).

Although the supreme court reversed the armed robbery judgment, the mandate was not issued and recorded until April 10, 1998, so the trial court, in sentencing the defendant on the manslaughter charge, did not abuse its discretion in beginning the calculation of credit for time served on that date. Skinner v. State, 790 So. 2d 218, 2001 Miss. App. LEXIS 238 (Miss. Ct. App. 2001).

The defendant was not entitled to approximately 105 days credit on his Mississippi conviction for the time served while awaiting extradition to Mississippi for unrelated charges, notwithstanding that those unrelated charges were ultimately dropped prior to his extradition to Mississippi. Taylor v. State, 726 So. 2d 227, 1998 Miss. App. LEXIS 1107 (Miss. Ct. App. 1998).

A defendant who was sentenced to 10 years imprisonment for armed robbery and 15 years imprisonment for manslaughter to run consecutively, would be eligible for parole on March 30, 1993, where he began the service of his 10-year armed robbery sentence on the date of his initial arrest pursuant to this section, he was legally released from that sentence 10 years later on February 5, 1990 but remained held under the 15-year manslaughter sentence, and he earned substantial meritorious earned time; although he would ordinarily have been required to serve at least ¼ of the manslaughter sentence-3 years and 9 months-before he became eligible for parole, his earned time advanced his earliest parole eligibility date by approximately 7 months. Milam v. State, 578 So. 2d 272, 1991 Miss. LEXIS 225 (Miss. 1991).

Under this section, a circuit judge of one county may grant credit for time served in a second county, where a prisoner is arrested and charged with a crime in the first county and, prior to arraignment, is subsequently transferred to the second county to face another charge, and where the transfer is attended by a detainer from the first county. Lee v. State, 437 So. 2d 1208, 1983 Miss. LEXIS 2881 (Miss. 1983).

This section has no application to time served in another state while an accused is awaiting return to Mississippi to face criminal charges, where to hold otherwise would encourage an accused to flee the State and seek refuge in another state or locality of his own choosing and fight extradition knowing that any time spent in jail in such state would be credited to any sentence received by him upon conviction. Holland v. State, 418 So. 2d 73, 1982 Miss. LEXIS 2111 (Miss. 1982).

2. Credit properly denied.

Mississippi Department of Corrections properly calculated an inmate's jail time credit under Miss. Code Ann. § 99-19-23. He was not entitled to credit for time spent in jail awaiting trial on subsequent charges as he was incarcerated on his original conviction at that time he committed and was charged with those crimes. Amerson v. Epps, 63 So. 3d 1246, 2011 Miss. App. LEXIS 285 (Miss. Ct. App. 2011).

3. Credit awarded.

Where defendant was convicted of one count of armed robbery as a habitual offender, the trial court did not err by imposing a 19.5 year sentence because it did not exceed his life expectancy of 20.2 years. Pursuant to Miss. Code Ann. § 99-19-23, the circuit court credited defendant with 172 days for time served before he was released on bond plus the time he served after his conviction but before his sentencing hearing. Hampton v. State, 148 So. 3d 1038, 2013 Miss. App. LEXIS 73 (Miss. Ct. App. 2013), aff'd, 148 So. 3d 992, 2014 Miss. LEXIS 513 (Miss. 2014).

RESEARCH REFERENCES

ALR.

Right of state or Federal prisoner to credit for time served in another jurisdiction before delivery to state or Federal authorities. 18 A.L.R.2d 511.

Right to credit for time served under erroneous or void sentence or invalid judgment for conviction necessitating new trial. 35 A.L.R.2d 1283.

Right to credit for time spent in custody prior to trial or sentence. 77 A.L.R.3d 182.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where court fails to specify in that regard. 90 A.L.R.3d 408.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as a condition of pretrial release. 29 A.L.R.4th 240.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 A.L.R.4th 192.

Defendant's Right to Credit for Time Spent in Halfway House, Rehabilitation Center, or Similar Restrictive Environment as Condition of Pretrial Release. 46 A.L.R.6th 63.

When is federal prisoner entitled, under 18 USCS § 3568, to credit for time spent in state custody "in connection with" offense or acts for which federal sentence was imposed. 47 A.L.R. Fed. 755.

Law Reviews.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Presentence Credit. 53 Miss. L. J. 159, March, 1983.

§ 99-19-25. Sentence; circuit and county judges and justice courts may suspend in misdemeanor cases; suspension of sentence or execution of sentence subsequent to original sentencing authorized under certain circumstances.

The circuit courts and the county courts, in misdemeanor cases, are hereby authorized to suspend a sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of five (5) years.

The justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Subsequent to original sentencing, the justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court, if (a) the judge or his or her predecessor was authorized to order such suspension when the sentence was originally imposed; and (b) such conviction (i) has not been appealed; or (ii) has been appealed and the appeal has been voluntarily dismissed. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under Sections 49-7-81, 49-7-95 and the Implied Consent Law shall not suspend any fine.

HISTORY: Codes, Hemingway's 1917, § 1275; 1930, § 1298; 1942, § 2541; Laws, 1914, ch. 207; Laws, 1950, ch. 347; Laws, 1964, ch. 358; Laws, 1973, ch. 470, § 1; Laws, 1981, ch. 491, § 14; Laws, 1995, ch. 551, § 4; Laws, 2009, ch. 374, § 1, eff from and after passage (approved Mar. 17, 2009.).

Editor's Notes — Laws of 1981, ch. 491, § 15, effective July 1, 1981, provides as follows:

"SECTION 15. Prosecutions, convictions and penalties for violations which occurred prior to the effective date of this act under laws amended or repealed by this act, or suspensions or denials of driver's licenses or permits made pursuant to laws amended or repealed by this act, shall not be affected or abated by the provisions of this act."

Cross References — Placing offender on earned probation program, see § 47-7-47.

Fines and other penalties under the Implied Consent Law, see § 63-11-30.

Compromise of petit misdemeanors where injured party has been satisfied, see § 99-15-51.

Prohibition against justices of the peace suspending sentence in intoxicating liquors prosecution, see § 99-27-43.

Sentencing, see MRCrP 26.4 through 26.8.

JUDICIAL DECISIONS

ANALYSIS

1. Generally.
2. Revocation of suspension.

1. Generally.

Even though a misdemeanor is punishable by a confinement period of one year or less under Uniform Circuit and County

Court Rule 6.01, a longer probationary period covering a misdemeanor with a suspended sentence can be inferred from this section. Conner v. State, 750 So. 2d 1258, 2000 Miss. LEXIS 3 (Miss. 2000).

This section [Code 1942, § 2541] is not unconstitutional as an intrusion upon the pardoning power of the governor. Gabriel v. Brame, 200 Miss. 767, 28 So. 2d 581, 1947 Miss. LEXIS 360 (Miss. 1947).

This provision does not authorize the deferment of the imposition of a sentence. White v. State, 185 Miss. 307, 188 So. 8, 1939 Miss. LEXIS 155 (Miss. 1939).

Appeal more than six months after conviction for disturbing peace of family held barred, though portion of sentence was suspended. Dickerson v. State, 150 Miss. 823, 117 So. 261, 1928 Miss. LEXIS 176 (Miss. 1928).

2. Revocation of suspension.

Power to revoke the suspension of a sentence for a misdemeanor is limited to a reasonable time; and revocation of a suspended 90-day sentence after five years is not within a reasonable time. Jackson v. Waller, 248 Miss. 172, 160 So. 2d 184 (Miss. 1964).

A suspension of sentence whether for a felony or a misdemeanor may not be revoked after five years. Jackson v. Waller, 248 Miss. 172, 160 So. 2d 184 (Miss. 1964).

Where the jail sentence of accused, who had been convicted of two separate charges of trespass and one of assault and battery was suspended during good behavior, an appeal would not lie from the trial judge's action revoking the suspension and committing the accused to jail following a finding, upon ample evidence, that accused had assaulted, without justification, another person; neither was the accused entitled to relief by invoking habeas corpus. Blount v. State, 229 Miss. 211, 90 So. 2d 373, 1956 Miss. LEXIS 602 (Miss. 1956).

Where defendant had waited for about 18 months before moving to withdraw plea of guilty and until after district attorney had moved to revoke suspension of sentence for violation of terms of suspension, there was a lack of diligence on the part of the defendant, and overruling of the motion for withdrawal of pleading of guilty was not abuse of discretion. Perciful v. Holley, 217 Miss. 203, 63 So. 2d 817, 1953 Miss. LEXIS 423 (Miss. 1953).

Violation of condition of suspended sentence, as basis for annulment and revocation of suspended sentence, need not be established beyond reasonable doubt, but only by evidence convincing court that condition was violated. McLemore v. State, 170 Miss. 641, 155 So. 415, 1934 Miss. LEXIS 171 (Miss. 1934).

OPINIONS OF THE ATTORNEY GENERAL

A justice court judge may not suspend the fine for a violation of the Implied Consent Law. Little, June 4, 1999, A.G. Op. #99-0265.

A justice court judge may not suspend the minimum monetary fine imposed for a head lighting deer violation; however, a circuit or county court judge may suspend such fine if the charge is brought in circuit or county court. Moffett, Sept. 27, 2002, A.G. Op. #02-0567.

This section permits a justice court judge to place conditions on the suspension of a sentence where the sentence has no jail time, i.e., only a fine, upon the conviction of a defendant of a misdemeanor. Adams, Aug. 1, 2003, A.G. Op. 03-0368.

This section allows a justice court to establish a probationary period of up to two years after suspension of a sentence. Adams, Aug. 1, 2003, A.G. Op. 03-0368.

This section allows a justice court to suspend sentences on such conditions as it deems advisable. Those conditions may include house arrest and/or probation services administered by private companies. If a defendant fails to comply with the conditions imposed by the justice court, the justice court may revoke the suspended sentence and enforce the original sentence. Young, July 7, 2004, A.G. Op. 04-0287.

Although a justice court judge may not suspend the minimum fine upon a nolo contendere plea on a DUI, he does not have to impose a fine on first offense DUI if he imposes a jail sentence or attendance at a victim impact panel. Sartin, Dec. 9, 2005, A.G. Op. 05-0596.

RESEARCH REFERENCES

ALR.

Propriety and effect of court's indication to jury that court would suspend sentence. 8 A.L.R.2d 1001.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 841 et seq.

CJS.

24 C.J.S., Criminal Law §§ 2145, 2147.

§ 99-19-27. Convicts who violate terms of suspended sentence or parole are subject to arrest.

Every convicted offender of a criminal law who receives a parole or suspended sentence for a definite time, and fails to surrender himself to the proper authority for execution of sentence on expiration of such parole or suspended sentence, shall be regarded and treated as an escaped convict and subject as such to arrest and return to the proper authorities by any officer or citizen who could have made such arrest had such offender been an ordinary escaped prisoner, and shall be promptly returned to the proper authorities for execution of sentence.

HISTORY: Codes, 1930, § 1299; 1942, § 2542; Laws, 1926, ch. 147.

Cross References — Probation and parole generally, see §§ 47-7-1 et seq.
Escape of prisoners generally, see § 97-9-43.
Criminal arrests generally, see Chapter 3 of this title.
Sentencing, see MRCrP 26.4 through 26.8.

RESEARCH REFERENCES

ALR.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 A.L.R.2d 1074.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R.6th 771.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 841 et seq.

59 Am. Jur. 2d, Pardon and Parole §§ 127, 128, 130, 133, 147.

CJS.

24 C.J.S., Criminal Law §§ 2159, 2160.

67A C.J.S., Pardon and Parole § 37.

§ 99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.

Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

HISTORY: Codes, 1930, § 1300; 1942, § 2543; Laws, 1926, ch. 147.

Cross References — Governor's power to pardon, see Miss. Const. Art. 5, § 124. Probation and parole generally, see §§ 47-7-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.
3. Notice and hearing.
4. Evidence.
5. Appeals.

1. In general.

Post-conviction relief was properly denied in a case involving a probation revocation because appellant inmate did not have the right to counsel since the issues were not complex, and no request for counsel was made. It was noted that the inmate had admitted to violating his probation. Silliman v. State, 8 So. 3d 256, 2009 Miss. App. LEXIS 115 (Miss. Ct. App. 2009).

Where a probation revocation case was not complex since defendant admitted violating the terms of such, and the hearing did not involve any new felonies, it was not error to refuse to appoint counsel. Coleman v. State, 971 So. 2d 637, 2007 Miss. App. LEXIS 420 (Miss. Ct. App. 2007), cert. denied, 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), cert. denied, 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Where appellant was convicted of two counts of selling a controlled substance, his sentence was suspended during five years of probation, and appellant's probation was later revoked when he was convicted of selling marijuana; appellant was not entitled to appointed counsel during the probation revocation hearing; he presented no evidence that the probation revocation required counsel or that the court denied his request for counsel. Sanders v. State, 942 So. 2d 298, 2006 Miss. App. LEXIS 853 (Miss. Ct. App. 2006).

This section [Code 1942, § 2543] is effectual to regulate the right of any court, which has the power to impose sentences upon anyone convicted of crime, to suspend a sentence and therefore to revoke such suspension upon proper showing that the suspension should be revoked. Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913, 1954 Miss. LEXIS 398 (Miss. 1954).

There is no limitation or restriction contained in the constitution that would preclude the governor from granting suspended sentences on conditions that may be both advisable and expedient in his opinion as to the proper exercise of executive clemency. Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913, 1954 Miss. LEXIS 398 (Miss. 1954).

A former suspended sentence may under this section [Code 1942, § 2543] be revoked in vacation, but there is no authority to impose a sentence except in term time. White v. State, 214 Miss. 235, 58 So. 2d 510, 1952 Miss. LEXIS 462 (Miss. 1952).

Under this section [Code 1942, § 2543] which provides that whenever an offender has violated the condition of a suspended sentence the court is authorized to annul such suspended sentence and the offender shall be subject to arrest and court sentence service, as if no suspended sentence has been granted and for the full term of the original sentence that had not been served, the court may enforce the judgment and revoke the suspension of execution at any subsequent time, even after the original period of the sentence has passed. Smith v. State, 212 Miss. 497, 54 So. 2d 739, 1951 Miss. LEXIS 475 (Miss. 1951).

This section [Code 1942, § 2543] is not unconstitutional as an intrusion upon the pardoning power of the governor. Gabriel v. Brame, 200 Miss. 767, 28 So. 2d 581, 1947 Miss. LEXIS 360 (Miss. 1947).

No authority is found in this section [Code 1942, § 2543] for a circuit judge in vacation to impose a sentence for a misdemeanor. White v. State, 185 Miss. 307, 188 So. 8, 1939 Miss. LEXIS 155 (Miss. 1939).

2. Applicability.

Statute addressing suspended sentences and conditional pardons could not have been used as authority to revoke post-release supervision; the procedures for the revocation of post-release supervision were prescribed exclusively in another statute. Atwood v. State, 183 So. 3d 843, 2016 Miss. LEXIS 18 (Miss. 2016).

3. Notice and hearing.

Where governor in granting an indefinite suspension of sentence imposed the condition that it may be revoked without notice for any reason deemed sufficient to the governor and he may not have been willing to grant the suspension otherwise and prisoner agreed by accepting the order of suspension, the prisoner waived right to notice and hearing upon a question of revocation of suspension of sentence without notice and hearing. Pope v. Wiggins, 220 Miss. 1, 69 So. 2d 913, 1954 Miss. LEXIS 398 (Miss. 1954).

While this section [Code 1942, § 2543] does not so specfically require, one whose suspended sentence is subject to revocation is entitled to notice and the opportunity to be heard at public hearing before revocation of such suspended sentence. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106, 1950 Miss. LEXIS 375 (Miss. 1950).

Revocation of a suspended sentence without notice and an opportunity to be heard at public hearing to defendant violates the requirements of due process, even though the statute providing for such revocation does not specifically provide for notice and public hearing. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106, 1950 Miss. LEXIS 375 (Miss. 1950).

Although judgments of convictions of law violations rendered subsequent to the suspension of a sentence, and which are unappealed from, constitute a sufficient showing that the conditions of the suspension had been violated, even in such case defendant is entitled to an opportunity to be heard as to whether the affidavits or indictments alleged any crime known to the law, and as to whether he had in truth and in fact been guilty of any misbehavior after first showing, if he could, that the judgments of conviction are void. Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106, 1950 Miss. LEXIS 375 (Miss. 1950).

4. Evidence.

Post-conviction relief was properly denied in a case involving a probation revocation because the State had adequately established that there was a violation of the terms and conditions of probation due to appellant inmate admission to such; moreover, his probation was not revoked simply due to a failure to pay fines and fees. Silliman v. State, 8 So. 3d 256, 2009 Miss. App. LEXIS 115 (Miss. Ct. App. 2009).

A hearing upon a petition for revocation of a suspension of sentence is not in the nature of a criminal trial and it is not incumbent upon the state to show beyond a reasonable doubt the defendant has violated the conditions of the suspension order and it is only necessary that the evidence be sufficient to convince the court that the conditions of the suspension have been violated. Murphy v. Lawhon, 213 Miss. 513, 57 So. 2d 154, 1952 Miss. LEXIS 392 (Miss. 1952).

The court did not abuse its discretion in permitting the district attorney to conduct a thorough cross examination of the defendant, who was testifying voluntarily as a witness in his own behalf, for the purpose of testing the truthfulness of his statements and for the purpose of determining whether he had been guilty of such misconduct as would justify the revocation of the suspension. Murphy v. Lawhon, 213 Miss. 513, 57 So. 2d 154, 1952 Miss. LEXIS 392 (Miss. 1952).

The violation of the conditions for suspension of sentence for unlawful possession of intoxicating liquor, need not be established beyond a reasonable doubt but only by evidence convincing the court of such violation. Shook v. State, 212 Miss. 472, 54 So. 2d 728, 1951 Miss. LEXIS 472 (Miss. 1951).

Where the record in proceedings for the revocation of suspension of sentence, shows that the appellant was given due notice and an opportunity to be heard and was accorded a public hearing, the orders of revocation were valid. Shook v. State, 212 Miss. 472, 54 So. 2d 728, 1951 Miss. LEXIS 472 (Miss. 1951).

Violation of condition of suspended sentence, as basis for annulment and revocation of suspended sentence, need not be established beyond reasonable doubt, but only by evidence convincing court that condition was violated. McLemore v. State, 170 Miss. 641, 155 So. 415, 1934 Miss. LEXIS 171 (Miss. 1934).

5. Appeals.

Order revoking suspension of sentence of accused who had pleaded guilty of unlawful possession of intoxicating liquors held not appealable. Cooper v. State, 175 Miss. 718, 168 So. 53, 1936 Miss. LEXIS 73 (Miss. 1936). But see De La Beckwith v. State, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Where hearing with respect to revocation of suspended sentence is public and on reasonable notice and evidence is sufficient to convince reasonable person that conditions of suspension have been broken, convict has no recourse when judge revokes suspension except to serve sentence and pay fine in so far as theretofore suspended, and in any event convict has no recourse by appeal. Cooper v. State, 175 Miss. 718, 168 So. 53, 1936 Miss. LEXIS 73 (Miss. 1936). But see De La Beckwith v. State, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

RESEARCH REFERENCES

ALR.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 A.L.R.2d 1074.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Admissibility of hearsay evidence in probation revocation hearings. 11 A.L.R.4th 999.

Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R.6th 771.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 841 et seq.

59 Am. Jur. 2d, Pardon and Parole §§ 127, 128, 130, 133, 147.

CJS.

24 C.J.S., Criminal Law §§ 2159, 2160.

67A C.J.S., Pardon and Parole § 37.

§ 99-19-31. Penalty where none fixed elsewhere by statute.

Offenses for which a penalty is not provided elsewhere by statute, and offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than one thousand dollars ($1,000.00) and imprisonment in the county jail not more than six (6) months, or either.

HISTORY: Codes, 1957, ch. 64, art. 356; 1871, § 2863; 1880, § 3098; 1892, § 1454; 1906, § 1527; Hemingway's 1917, § 1289; 1930, § 1314; 1942, § 2562; Laws, 1984, ch. 353, § 3, eff from and after July 1, 1984.

Cross References — Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2562] does not apply to the chancery court's power to punish for violation of an injunction prohibiting gambling operations and abating gambling establishment as nuisance but the defendant could be punished under Code 1942, § 1278, which gives the chancery court power to punish for violation of an injunction. Alexander v. State, 210 Miss. 517, 49 So. 2d 890, 1951 Miss. LEXIS 290 (Miss. 1951).

Since the power exercised by the lower court in the prosecution and sentence for constructive contempt was derived from the inherent powers of the court, this section [Code 1942, § 2562] was without application. Melvin v. State, 210 Miss. 132, 48 So. 2d 856, 1950 Miss. LEXIS 329 (Miss. 1950).

Code 1942, § 2613, subd (b) authorizing the imposition of a minimum fine for unlawful possession of intoxicating liquors but fixing no maximum fine, is incomplete and is supplemented by this section [Code 1942, § 2562], fixing a maximum fine of $500 for misdemeanors where no other statutes prescribe a penalty. Jenkins v. State, 207 Miss. 281, 42 So. 2d 198, 1949 Miss. LEXIS 338 (Miss. 1949).

A charge under this section [Code 1942, § 2562] of assault and battery with fists cannot be consolidated with a charge of exhibiting a deadly weapon in a rude, angry and threatening manner (Code 1942, § 2086) and a charge of carrying concealed a deadly weapon (Code 1942, § 2079), and one trial had of the consolidated case. Woods v. State, 200 Miss. 527, 27 So. 2d 895, 1946 Miss. LEXIS 318 (Miss. 1946).

A case within this provision where the punishment was excessive affirmed and the punishment ordered reduced. Keel v. State, 133 Miss. 160, 97 So. 521, 1923 Miss. LEXIS 116 (Miss. 1923).

RESEARCH REFERENCES

ALR.

Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 A.L.R.4th 1069.

When does delay in imposing sentence violate speedy trial provision. 86 A.L.R.4th 340.

§ 99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.

(1) Offenses punishable by imprisonment in the State Penitentiary for more than one (1) year and for which no fine is provided elsewhere by statute may be punishable by a fine not in excess of Ten Thousand Dollars ($10,000.00). Such fine, if imposed, may be in addition to imprisonment or any other punishment or penalty authorized by law.

(2) Such assessments as are collected under subsection (5) of Section 99-19-73 shall be deposited in a special fund hereby created in the State Treasury to be designated the "Criminal Justice Fund." The Legislature may make appropriations from the Criminal Justice Fund for the purpose of defraying such costs as the state incurs in the administration of the criminal justice system of this state.

HISTORY: Laws, 1985, ch. 495, § 1; Laws, 1990, ch. 329, § 14, eff from and after October 1, 1990.

Cross References — Duty of state officials to pay in collections, see § 7-9-21.

Deposit into the criminal justice fund of an additional find imposed on a person convicted of issuing a bad check when the prosecution was commenced by the filing of a complaint by the district attorney after the accused failed to make restitution, see § 97-19-67.

Deposit of funds received as restitution for a bad check into the criminal justice fund when the complainant cannot be located, see § 97-19-77.

Imposition of fine, imprisonment for nonpayment, and application to indigent defendants, see § 99-19-20.

Collection of fines and duties of collecting officers, see §§ 99-19-65 et seq.

Deposit of portion of standard state assessment into the Criminal Justice Fund, see § 99-19-73.

Deposit of funds from escrow account established pursuant to Crime Victim's Escrow Account Act into Criminal Justice Fund, see § 99-38-9.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Ability to pay.

1. In general.

Since the crime of incest was punishable by imprisonment for more than one year and was not otherwise subject to fine, defendant convicted of incest was subject to a $10,000 fine. Cochran v. State, 969 So. 2d 119, 2007 Miss. App. LEXIS 476 (Miss. Ct. App. 2007).

Where a defendant is convicted of manslaughter under Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 99-19-32(1), and the sentence imposed is a term of imprisonment in the penitentiary, the fine provision of Miss. Code Ann. § 97-3-25 is not applicable. However, where the offense is punishable by imprisonment in the penitentiary for more than one year and the imposition of a fine is not provided elsewhere, Miss. Code Ann. § 99-19-32(1) is applicable and allows for imposition of a fine not in excess of $ 10,000. Felder v. State, 876 So. 2d 372, 2004 Miss. LEXIS 776 (Miss. 2004).

In viewing Miss. Code Ann. §§ 97-3-25, 99-19-32(1), and § 47-7-49 in pari materia, the trial court was within its discretion to order defendant, convicted of manslaughter and sentenced to a term of imprisonment, to pay not only a $10,000 fine, but also a $ 10,000 assessment to the Mississippi Crime Victims' Compensation Fund. Felder v. State, 876 So. 2d 372, 2004 Miss. LEXIS 776 (Miss. 2004).

As a trial judge clearly had authority via Miss. Code Ann. § 99-19-32 to impose a fine in addition to the penitentiary sentence imposed under the felony portion of the embezzlement statute, former Miss. Code Ann. § 97-23-19 (which provided for a fine only when being sentenced as a misdemeanant), the trial judge properly rejected the inmate's argument that upon payment of the fine he had completed his misdemeanor sentence and was entitled to release from the prison sentence. Gulley v. State, 870 So. 2d 652, 2004 Miss. LEXIS 218 (Miss. 2004).

2. Ability to pay.

In was not error for the trial court to impose a $10,000 fine, court-appointed attorney fees, and costs on the defendant in a murder prosecution without first inquiring into the defendant's ability to pay. Conley v. State, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

RESEARCH REFERENCES

ALR.

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 A.L.R.3d 926.

Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees paid by litigants. 72 A.L.R.3d 375.

Substitution of judge in state criminal trial. 45 A.L.R.5th 591.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 1197 et seq.

§ 99-19-33. Where penalty modified milder penalty may be imposed.

If any statute shall provide a punishment of the same character, but of milder type, for an offense which was a crime under pre-existing law, then such milder punishment may be imposed by the court but no conviction, otherwise valid, shall be set aside and new trial granted merely because of an error of the court in fixing punishment. Such error shall only entitle the party injured to vacate or reverse the judgment as to the punishment, and the legal punishment shall then be imposed by another sentence based on the original conviction or plea of guilty.

HISTORY: Codes, 1906, § 1574; Hemingway's 1917, § 1336; 1930, § 1362; 1942, § 2609.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Application.

1. In general.

Trial court did not abuse its discretion in sentencing defendant as an habitual offender to thirty years for possession of cocaine with intent to distribute because it was the maximum prison penalty at the time of his original sentence; defendant's original sentence was imposed when the maximum sentence prescribed for the crime was thirty years, and the statute that lowered the maximum penalty did not take effect until more than five years after the initial sentence Wells v. State,

202 So. 3d 1230, 2016 Miss. LEXIS 445 (Miss. 2016).

Defendant was entitled to be sentenced for uttering a forgery under the amended version of Miss. Code Ann. § 97-21-33 because it was amended before his conviction became final and his sentence was legal under Miss. Code Ann. § 99-19-33; the trial judge could sentence a person to a term of not less than two years nor more than ten years. Peterson v. State, 963 So. 2d 29, 2007 Miss. App. LEXIS 517 (Miss. Ct. App. 2007).

In a hearing for post-conviction relief, a trial court did not err by changing a sentence imposed to reflect the amended sentencing range under Miss. Code Ann. § 97-21-33 where the facts showed that defendant entered a valid and voluntary guilty plea, but was sentenced illegally; it was an inadvertent failure of the trial court, the district attorney, and defense counsel to realize there was a change in the maximum sentence. Coleman v. State, 971 So. 2d 637, 2007 Miss. App. LEXIS 420 (Miss. Ct. App. 2007), cert. denied, 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), cert. denied, 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Sentence of 36 years for rape of a child under the age of 14 following remand from the appellate court for resentencing on defendant's original 50-year sentence after an amendment to Miss. Code Ann. § 97-3-65 reduced the maximum sentence from death or life imprisonment to 20 years to life was proper; defendant's argument that the sentence was the equivalent of life and was therefore not a lesser punishment within the meaning of Miss. Code Ann. § 99-19-33 was without merit. Johnson v. State, 824 So. 2d 638, 2002 Miss. App. LEXIS 456 (Miss. Ct. App. 2002).

When a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended. Daniels v. State, 742 So. 2d 1140, 1999 Miss. LEXIS 215 (Miss. 1999), overruled by Wilson v. State, 194 So. 3d 855 (Miss. 2016), to the extent that Daniels holds that Section 99-19-33 requires a sentencing court to apply a newer sentencing statute instead of the sentencing scheme in effect when a crime was committed.

This section gives the trial judge the right to sentence one convicted of crime after the law has been changed so as to permit a milder sentence before the conviction has become final, but does not apply where the statute providing for a milder sentence is passed after the conviction has become final. Davis v. State, 308 So. 2d 87, 1975 Miss. LEXIS 1841 (Miss. 1975).

Where the trial court has imposed a sentence other than that prescribed by law, the defendant may be brought before the court upon an alias capias for imposition of the proper sentence. Smithey v. State, 93 Miss. 257, 46 So. 410, 1908 Miss. LEXIS 82 (Miss. 1908).

The failure of the trial court to impose a proper sentence does not deprive the defendant in another prosecution of the right to plead former jeopardy. Smithey v. State, 93 Miss. 257, 46 So. 410, 1908 Miss. LEXIS 82 (Miss. 1908).

2. Application.

Defendant was correctly sentenced under the provisions of the statute in effect at the time he committed the crime of sale of a controlled substance because the addition of a quantity element to the crime of sale of a controlled substance did not create a completely new crime; the statute did not apply because there was a change in punishment for the same crime. Ware v. State, — So. 3d —, 2019 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 23, 2019), cert. denied, 279 So. 3d 1086, 2019 Miss. LEXIS 386 (Miss. 2019).

Daniels v. State, 742 So. 2d 1140 (Miss. 1999), is overruled to the extent that it holds that Miss. Code Ann. § 99-19-33 requires a sentencing court to apply a newer sentencing statute instead of the sentencing scheme in effect when a crime was committed. Wilson v. State, 194 So. 3d 855, 2016 Miss. LEXIS 262 (Miss. 2016).

When the statute under which defendant was sentenced was amended, the amendment did not entitle defendant to the post-conviction relief of being resentenced under the amended statute because (1) the sentence had become final when the statute was amended, (2) for a sentencing statute to be retroactive, the statute had to so state, and this statute did not, and (3) Miss. Code Ann. § 99-19-33 had no bearing, since defendant's conviction became final before the statute was amended. Barnett-Phillips v. State, 195 So. 3d 226, 2016 Miss. App. LEXIS 377 (Miss. Ct. App. 2016).

Offense defined in the amended version of Miss. Code Ann. § 97-17-70(4) is not the same offense defined in the prior version simply because it is set out in the same place under the same heading. There is no longer one felony offense of receiving stolen property; there are now three different and new felony offenses, each of which requires proof that the defendant received property within a different range of dollar values. Miss. Code Ann. § 99-19-33 (Rev. 2015) applies and permits sentencing under the amended version of the statute for an offense which was a crime under pre-existing law. Wilson v. State, 198 So. 3d 408, 2016 Miss. App. LEXIS 149 (Miss. Ct. App.), cert. denied, 202 So. 3d 616, 2016 Miss. LEXIS 368 (Miss. 2016).

Trial court did not err by failing to apply the ameliorative provisions contained in the amendments to the shoplifting statute because the amendment dealt with the elements of the offense, rather than the penalty. As such, it was proper to deny a requested instruction that reflected the amended statute, which would have found defendant guilty of felony shoplifting only if the price of the goods exceeded $1,000. Moore v. State, 187 So. 3d 109, 2016 Miss. LEXIS 41 (Miss. 2016).

Post-conviction relief was denied in a case where appellant inmate's post-release supervision and suspended sentences were revoked because the inmate was merely ordered to serve the remainder of his sentence under Miss. Code Ann. § 47-7-37; therefore, he was not entitled to a milder sentence for forgery, pursuant to Miss. Code Ann. § 99-19-33. Lenoir v. State, 4 So. 3d 1056, 2008 Miss. App. LEXIS 585 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 122 (Miss. 2009).

§ 99-19-35. Person convicted of certain crimes not to practice medicine or dentistry, or hold office.

A person convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy, shall not be allowed to practice medicine or dentistry, or be appointed to hold or perform the duties of any office of profit, trust, or honor, unless after full pardon for the same.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 2(63); 1857, ch. 64, art. 358; 1871, § 2865; 1880, § 3100; 1892, § 1455; 1906, § 1528; Hemingway's 1917, § 1290; 1930, § 1315; 1942, § 2563; Laws, 1987, ch. 499, § 18, eff from and after July 24, 1987 (the date on which the United States Attorney General interposed no objection to the amendment).

Editor's Notes — Laws of 1987, ch. 499, § 20, provide as follows:

"SECTION 20. If any section, paragraph, sentence, clause or phrase of this act is declared to be unconstitutional or void, or for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses or phrases shall be in no manner affected thereby but shall remain in full force and effect."

The United States Attorney General interposed no objection on July 24, 1987, to the amendment proposed by § 18, ch. 499, Laws of 1987.

JUDICIAL DECISIONS

1. In general.

Request to be sentenced pursuant to Miss. Code Ann. § 99-15-26 can be offered during plea negotiations, but it is within the circuit or county judge's discretion to accept such a request; in defendant's case, the circuit court accepted defendant's guilty plea and adjudicated defendant accordingly. Thus, the circuit court did not err in denying defendant's petition for expungement, and in any event, defendant, convicted of burglary, could not hold any office until defendant was pardoned for that crime. Turner v. State, 876 So. 2d 1056, 2004 Miss. App. LEXIS 605 (Miss. Ct. App. 2004).

Physician was not entitled to reinstatement of a medical license after completing sentence imposed for federal money laundering conviction; statute bars doctor convicted of felony involving moral turpitude from practicing profession and physician's reputation for truth and veracity were not good. Montalvo v. Mississippi State Bd. of Medical Licensure, 671 So. 2d 53, 1996 Miss. LEXIS 65 (Miss. 1996).

OPINIONS OF THE ATTORNEY GENERAL

Mississippi Supreme Court has interpreted similar provisions in Mississippi Constitution to apply only to convictions of such crimes in courts of Mississippi and not to convictions of crimes in federal court or in another state; person convicted of crime in United States District Court would not fall within scope of § 99-19-35. Harris, August 29, 1990, A.G. Op. #90-0657.

RESEARCH REFERENCES

ALR.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office. 52 A.L.R.2d 1314.

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 39 A.L.R.3d 303.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 1311 et seq.

25 Am. Jur. 2d, Elections §§ 168, 170 et seq.

63C Am. Jur. 2d, Public Officers and Employees §§ 74 et seq.

§ 99-19-37. Restoration of right of suffrage to World War veterans.

(1) Any person who has lost the right of suffrage by reason of conviction of crime and has not been pardoned therefrom, who thereafter served honorably in any branch of the armed forces of the United States during the periods of World War I or World War II as hereinafter defined and shall have received an honorable discharge, or release therefrom, shall by reason of such honorable service, have the full right of suffrage restored, provided, however, this does not apply to any one having an unfinished or suspended sentence.

(2) For the purposes of this section the period of World War I shall be from April 6, 1917 to December 1, 1918, and the period of World War II shall be from December 7, 1941 to December 31, 1946.

(3) In order to have restored, and to exercise, the right of franchise under the provisions of this section a person affected hereby shall have his discharge, or release, from the armed forces of the United States recorded in the office of the chancery clerk of the county in which such person desires to exercise the

right of franchise and if such discharge, or release, appears to be an honorable discharge, or release, and shows such person to have served honorably during either of the periods stated in subsection (2) of this section such person shall have the full right of suffrage restored as though an act had been passed by the legislature in accordance with Section 253 of the Constitution of the State of Mississippi restoring the right of suffrage to such person.

HISTORY: Codes, 1942, § 2563.5; Laws, 1948, ch. 505, §§ 1-3.

Cross References — Restoration of right of suffrage after crime, see Miss. Const. Art. 12, § 253.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

RESEARCH REFERENCES

ALR.

Validity, construction, and application of state criminal disenfranchisement provisions. 10 A.L.R.6th 31.

§ 99-19-39. Detention of convict pending appeal.

If the defendant appeal from the conviction and be not removed on appeal, as provided in the next succeeding section, he shall be detained, according to the judgment of the circuit court, until the supreme court shall have decided his case, and the judgment thereof shall have been certified to the circuit court and the same fully executed.

HISTORY: Codes, 1857, ch. 64, art. 312; 1871, § 2813; 1880, § 3087; 1892, § 1444; 1906, § 1517; Hemingway's 1917, § 1276; 1930, § 1301; 1942, § 2544.

Cross References — Confinement of male prisoners sentenced to death, see § 99-19-55.

Disposition of criminal defendant following review by supreme court, see §§ 99-35-131 et seq.

JUDICIAL DECISIONS

1. In general.

An appeal to the Supreme Court of the United States effectively stayed the execution of prisoner's sentence to life imprisonment in the state penitentiary, and pending the disposition of that appeal, punishment of the prisoner by a confinement in the state penitentiary could not be exacted, and the prisoner was entitled to be incarcerated in the jail of the county where he was convicted and sentenced, subject to the power of the circuit judge of the county to order his removal to some other jail for safekeeping. Lang v. State, 230 Miss. 147, 87 So. 2d 265, 1956 Miss. LEXIS 645 (Miss.), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167, 1956 U.S. LEXIS 165 (U.S. 1956).

§ 99-19-41. Delivery of appellant to county where supreme court is held.

When any person shall be convicted of an offense and an appeal shall be taken to the supreme court, the sheriff shall, on an order for that purpose from the judge of the court where he was tried, or a judge of the supreme court, deliver such convict to the sheriff of the county where the supreme court is held, at the term thereof to which the appeal shall be made returnable, who shall safely keep such prisoner, subject to the order of the supreme court.

HISTORY: Codes, 1857, ch. 64, art. 314; 1871, § 2815; 1880, § 3088; 1892, § 1445; 1906, § 1518; Hemingway's 1917, § 1277; 1930, § 1302; 1942, § 2545.

Cross References — Duties of Sheriffs generally, see § 19-25-67.

Detention of convict pending appeal, see § 99-19-39.

Duty of sheriff of Hinds County to receive and safely keep, according to supreme court order, all persons ordered into his custody, see § 99-35-127.

Disposition of criminal defendant following review by supreme court, see §§ 99-35-131 et seq.

JUDICIAL DECISIONS

1. In general.

Action by convicted murderer sentenced to life imprisonment to be returned from state penitentiary to county detention center during pendency of his appeal, as mandated by this section, is subject to one year statute of limitations, where inmate brought this action under 42 USCS § 1983. Fairley v. Allain, 817 F.2d 306, 1987 U.S. App. LEXIS 6482 (5th Cir. Miss. 1987).

§ 99-19-42. Post-conviction proceeding; time for hearing and return to Department of Corrections.

Any offender in the custody of the Department of Corrections who is summoned to a county by court order for any post-conviction proceeding shall have such proceeding heard during the term of court in which the offender is returned to the custody of a county. If the offender's case is not heard during such term of court, the offender shall be returned to the facility of the Department of Corrections from which he was summoned. If the offender is not returned within one (1) week of the end of the term of court, the county housing the offender shall not receive the Twenty Dollars ($20.00) allowed under Section 47-5-901 for housing state offenders after the one-week time required for returning the offender to the Department of Corrections.

HISTORY: Laws, 1995, ch. 566, § 1, eff from and after July 1, 1995.

Cross References — State offenders serving sentences in county jails generally, see §§ 47-5-901 through 47-5-911.

Appearance by criminal defendant held in custody or confinement by means of closed-circuit television, see § 99-1-23.

RESEARCH REFERENCES

CJS.

24 C.J.S., Criminal Law § 2223.

§ 99-19-43. Duty of judge when convict sentenced to penitentiary.

It shall be the duty of the judge, when any convict is sentenced to imprisonment in the penitentiary, to commit the convict to the nearest jail which may be deemed safe, and by the next mail after the sentence to give notice to the warden of the penitentiary that such convict is confined, subject to his order, in a certain county jail, and to inform him whether, in his opinion, he is a dangerous criminal, and whether more than ordinary precautions will be necessary in guarding him.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 17(82); 1857, ch. 64, art. 321; 1871, § 2852; 1880, § 3089; 1892, § 1446; 1906, § 1519; Hemingway's 1917, § 1278; 1930, § 1303; 1942, § 2546.

Cross References — Transportation of prisoners from place of confinement to penitentiary, see § 47-5-111.

Placing of offender on earned probation program, see § 47-7-47.

Disposition of criminal defendant following review by supreme court, see §§ 99-35-131 et seq.

§ 99-19-45. Commitment to penitentiary; duties of clerks of circuit court; fees.

The clerks of the circuit court of the counties in the State of Mississippi shall furnish the Mississippi Department of Corrections, within five (5) days after adjournment of court, a commitment paper showing the name, sex, race and social security number of the person convicted and the crime committed, along with certified copies of the sentencing order and indictment, as well as any subsequent order entered by the court in such cause.

The clerks shall also furnish the Department of Corrections, within five (5) days after adjournment of such court, a certified copy of the probation order of an individual who is placed on probation under the supervision of the Division of Community Corrections of the department. Such order shall provide the name of the person placed on probation, the crime, term of sentence, date of sentence, period of probation, sex, race and a brief history of the crime committed.

As compensation for such services they shall receive the sum of Fifty Cents (50¢) for each transcript, and the sum shall be paid out of the treasury of the county, with the approval of the board of supervisors, on the filing of a bill for such service.

HISTORY: Codes, Hemingway's 1917, §§ 1279, 1280; 1930, §§ 1304, 1305; 1942, §§ 2547, 2548; Laws, 1912, ch. 147; Laws, 1991, ch. 379 § 1; Laws, 2002, ch. 624, § 10; Laws, 2006, ch. 455, § 1, eff from and after July 1, 2006.

Cross References — Clerks of the circuit courts generally, see §§ 9-7-121 through 9-7-141.

Form to be used in transmitting – required data upon commitment of persons convicted of crimes to penitentiary, see § 99-19-47.

Clerk of the court to deliver to commissioner of corrections warrant for the execution of condemned person, see § 99-19-55.

JUDICIAL DECISIONS

1. In general.

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to this section may be introduced in evidence as proof of such conviction; the absence of a limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. Pace v. State, 407 So. 2d 530, 1981 Miss. LEXIS 2293 (Miss. 1981), overruled in part, Hopson v. State, 625 So. 2d 395, 1993 Miss. LEXIS 422 (Miss. 1993).

RESEARCH REFERENCES

Am. Jur.

21 Am. Jur. 2d, Criminal Law § 865.

§ 99-19-47. Commitment to penitentiary; form.

The following form, to be furnished by the county, shall be used in transmitting the required data:

"Commitment of ________________ (insert name of person)

Circuit Court, County of ________________.

To the Mississippi Department of Corrections:

You are hereby notified that at the ________ term, 2______, of the circuit court, Judge ________________ presiding, the following named person was tried, convicted and sentenced to a term in the State Penitentiary, as follows:

Name ____________________________ Alias ____________________________
Crime Social Security No. ____________
Sex ____________________________
Race ____________________________
Appealed ____
Remarks:
____
____
____
Dated ___________, 2_______. ___________________________ Clerk."

HISTORY: Codes, Hemingway's 1917, § 1281; 1930, § 1306; 1942, § 2549; Laws, 1912, ch. 147; Laws, 1991, ch. 379 § 2; Laws, 2006, ch. 455, § 2, eff from and after July 1, 2006.

Cross References — Probation and parole generally, see §§ 47-7-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

§ 99-19-48. Placement of person on probation; form for report.

The following form, to be furnished by the county, shall be used in transmitting the required data for any individual placed on probation under the supervision of the Division of Community Corrections of the Department of Corrections:

"Circuit Court, County of ______________.

To the Mississippi Department of Corrections:

You are hereby notified that at the ________ term, 2______, of the circuit court, Judge ________ presiding, the following named person was tried, convicted and sentenced to a term in the State Penitentiary. The sentence was suspended and the person was placed on probation:

Name ____________________________ Alias ____________________________
Date of sentence ______________ Crime ____________________________
Term of sentence ______________ Sex ________________________________
Race __________________ Appealed ____________________
Remarks: Give brief summary of crime committed. ______________________
____
____
____
Dated ________, 2______. ________________________ Clerk."

HISTORY: Laws, 1991, ch. 379, § 3; Laws, 2002, ch. 624, § 11, eff from and after July 1, 2002.

Cross References — Probation and parole generally, see §§ 47-7-1 et seq.

§ 99-19-49. Repealed.

Repealed by Laws, 2000, ch. 569, § 18, eff from and after passage July 1, 2000.

§ 99-19-49. [Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(10); 1857, ch. 64, art. 309; 1871, § 2810; 1880, § 3085; 1892, § 1442; 1906, § 1515; Hemingway's 1917, § 1273; 1930, § 1296; 1942, § 2539; Laws, 1984, ch. 448, § 1, eff from and after July 1, 1984.]

Editor's Notes — Former § 99-19-49 provided for the setting of a day for the execution of a death sentence. For current similar provisions, see § 99-19-106.

Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.' "

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

§ 99-19-51. Manner of execution of death sentence; execution team; confidentiality of identities of members of execution team, supplier of lethal injection chemicals and witnesses listed in Section 99-19-55(2); immunity.

(1) The manner of inflicting the punishment of death shall be by the sequential intravenous administration of a lethal quantity of the following combination of substances: (a) an appropriate anesthetic or sedative; (b) a chemical paralytic agent; and (c) potassium chloride, or other similarly effective substance, until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice. As used in this section, the term "appropriate anesthetic or sedative" means any substance that, if properly administered in a sufficient quantity, is likely to render the condemned inmate unconscious, so that the execution process should not entail a substantial risk of severe pain.

(2) If the method of execution authorized in subsection (1) of this section is held unconstitutional by a court of competent jurisdiction or is otherwise unavailable, then the sentence of death shall be carried out by nitrogen hypoxia.

(3) If the methods of execution authorized in subsections (1) and (2) of this section are held unconstitutional by a court of competent jurisdiction or are otherwise unavailable, then the sentence of death shall be carried out by electrocution.

(4) If the methods of execution authorized in subsections (1), (2) and (3) of this section are held unconstitutional by a court of competent jurisdiction or are otherwise unavailable, then the sentence of death shall be carried out by firing squad.

(5) The Commissioner of Corrections has the authority and discretion to select and obtain the substances and the means necessary to carry out an execution, and may adopt and promulgate rules and regulations as the Commissioner deems necessary to administer and implement the provisions of this section.

(6)(a) The Commissioner of Corrections shall select an execution team to assist the executioner and his deputies. This team, including the State Executioner and his deputies who are responsible for the administration of lethal chemicals, shall consist of those persons, such as medical personnel, who provide direct support for the administration of lethal chemicals. This team shall also include those individuals involved in assisting in the execution in any capacity, as well as those personnel assigned to specific duties related to an execution.

(b) For the purposes of this section, "supplier of lethal injection chemicals" means a supplier or suppliers of lethal injection chemicals located within the State of Mississippi.

(c) The identities of all members of the execution team, a supplier of lethal injection chemicals, and the identities of those witnesses listed in Section 99-19-55(2) who attend as members of the victim's or the condemned person's immediate family shall at all times remain confidential, and the information is exempt from disclosure under the provisions of the Mississippi Public Records Act of 1983.

(7) Notwithstanding any provision of law to the contrary, any portion of any record of any kind that could identify a person as being a current or former member of an execution team or a current or former supplier of lethal injection chemicals, or those witnesses listed in Section 99-19-55(2) who attend as members of the victim's or the condemned person's immediate family, shall at all times be confidential, exempt, and protected from disclosure, but the remainder of the record shall not be protected unless otherwise provided by law. A court shall preserve the secrecy of all confidential and exempt information described in this section by reasonable means, which may include granting protective orders, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose such information without prior court approval.

(8) Notwithstanding any provision of law to the contrary, if a member of the execution team or supplier of lethal injection chemicals is licensed by a board or department, the licensing board or department shall not censure, reprimand, suspend, revoke, or take any other disciplinary action against the person's license because the person participated in a lawful execution. Any person or institution assisting with or participating in carrying out an execution in accordance with this statute shall be presumed to be acting in good faith. Any person or institution acting in good faith in connection with carrying out an execution shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed. All members of the execution team perform their respective functions as official duties on behalf of the state or any agency of the state.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(24); 1857, ch. 64, art. 323; 1871, § 2816; 1880, § 3091; 1892, § 1447; 1906, § 1520; Hemingway's 1917, § 1282; 1930, § 1307; 1942, § 2550; Laws, 1940, ch. 242; Laws, 1954, ch. 220, § 1; Laws, 1984, ch. 448, § 2; Laws, 1994, ch. 479, § 1; Laws, 1998, ch. 404, § 1; Laws, 2016, ch. 452, § 1; Laws, 2017, ch. 406, § 1, eff from and after passage (approved Apr. 5, 2017).

Cross References — Mississippi Public Records Act of 1983, see § 25-61-1 et seq.

Exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

Infliction of death sentence as exception to practice of nursing or medicine, see §§ 73-15-7, 99-19-53.

Execution of death sentence procedure, witnesses, certificate of execution and disposition of body, see § 99-19-55.

Procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.
3. Record requests.

1. In general.

In a post-conviction relief proceeding in which petitioner challenged the use of midazolam as the first drug in the three-drug lethal-injection protocol, the Supreme Court found that petitioner failed to set forth sufficient evidence to warrant an evidentiary hearing. Petitioner failed to provide credible evidence to support the contention that midazolam does not meet the statutory requirements in Miss. Code Ann. § 99-19-51(1). Jordan v. State, 266 So. 3d 986, 2018 Miss. LEXIS 497 (Miss. 2018).

Petitioner's claim that the he State could not use midazolam in its lethal injection because it was not an "ultra short-acting barbiturate or other similar drug" under the statute because the statute was amended; therefore, the supreme court declined to address whether midazolam was or was not a permissible drug under the amended statute. Jordan v. State, 224 So. 3d 1252, 2017 Miss. LEXIS 245 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

Death row prisoners had not demonstrated a substantial likelihood of success on merits of their claims because they did not establish a liberty interest in enforcement of Mississippi's statute governing lethal injection and because they had not shown that the state's alleged deviation from the statute would shock the conscience. They were not entitled to injunctive relief in federal court. Jordan v. Fisher, 813 F.3d 216, 2016 U.S. App. LEXIS 2293 (5th Cir. Miss.), op. withdrawn, sub. op., 823 F.3d 805, 2016 U.S. App. LEXIS 11734 (5th Cir. Miss. 2016).

A capital murder defendant was erroneously sentenced to death by "lethal gas" rather than death by "lethal injection," the manner of execution provided by subsection (1) of this section, and therefore the case would be remanded for modification of the sentence to comply with the statute. Hansen v. State, 649 So. 2d 1256, 1994 Miss. LEXIS 496 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422, 1995 U.S. LEXIS 7828 (U.S. 1995).

Where a new law gave condemned a choice as to the method of infliction of death penalty, the law was not an ex post facto law as to persons who were sentenced to death before the enactment of statute. Wetzel v. Wiggins, 226 Miss. 671, 85 So. 2d 469, 1956 Miss. LEXIS 448 (Miss.), cert. denied, 352 U.S. 807, 77 S. Ct. 80, 1 L. Ed. 2d 39, 1956 U.S. LEXIS 400 (U.S. 1956).

Where prior to the date of execution set for the defendant, the method thereof was changed from hanging to electrocution by means of an electric chair but no chair had as yet been obtained when such date arrived, resentencing and fixing another date for the execution was not a taking of defendant's life without due process of law. Childress v. State, 1 So. 2d 494 (Miss. 1941).

2. Constitutionality.

Prisoners awaiting execution in Mississippi were not entitled to an injunction preventing the State from conducting executions with compounded pentobarbital because Mississippi's sovereign immunity prevented a federal court from enjoining state officials to follow state law, Mississippi state law empowered prisoners to challenge their sentence, and the prisoners did not show they were likely to succeed in establishing a violation of either their procedural or substantive due process rights. Jordan v. Fisher, 823 F.3d 805, 2016 U.S. App. LEXIS 11734 (5th Cir. Miss. 2016), cert. denied, — U.S. —, 137 S. Ct. 1069, 197 L. Ed. 2d 188, 2017 U.S. LEXIS 1405 (U.S. 2017).

Eighth Amendment claims for equitable relief made under 42 U.S.C.S. § 1983 by death-sentenced inmates challenging their method of execution were barred by the three-year statute of limitations of Miss. Code. Ann. § 15-1-49 in that the claims accrued after completion of direct review or the date when the lethal injection statute of Miss. Code Ann. § 99-19-51 became effective and the limitations period was not tolled by Miss. Code Ann. § 15-1-67 or by equitable estoppel. Walker v. Epps, 550 F.3d 407, 2008 U.S. App. LEXIS 25327 (5th Cir. Miss. 2008), cert. denied, 558 U.S. 829, 130 S. Ct. 57, 175 L. Ed. 2d 45, 2009 U.S. LEXIS 5526 (U.S. 2009).

Death row inmates' 42 U.S.C.S. § 1983 suit challenging the constitutionality of Mississippi's lethal injection protocol was time-barred because it was filed more than three years after either the date upon which the inmates' individual cases became final on direct review or August 15, 1998, the effective date of Miss. Code Ann. § 99-19-51. Walker v. Epps, 587 F. Supp. 2d 763, 2008 U.S. Dist. LEXIS 53793 (N.D. Miss.), aff'd, 550 F.3d 407, 2008 U.S. App. LEXIS 25327 (5th Cir. Miss. 2008).

3. Record requests.

Chancery court erred, inter alia, in requiring Mississippi Department of Corrections to produce records, without redaction, pertaining to its process and protocol for lethal injections, because, during the pendency of the matter on appeal, the Legislature declared that the information sought was exempt, the Legislature did not include a saving clause, any rights involved in the present suit were public rights shared by all, and the applicant acquired no vested rights in the information as a result of submitting its request and did not take a prejudicial position in reliance on receiving the information. Miss. Dep't of Corr. v. Roderick & Solange MacArthur Justice Ctr., 220 So. 3d 929, 2017 Miss. LEXIS 141 (Miss. 2017).

RESEARCH REFERENCES

ALR.

Substantive Challenges to Propriety of Execution by Lethal Injection in State Capital Proceedings. 21 A.L.R. 6th 1.

Validity, construction, and operation of Federal Death Penalty Act, 18 U.S.C.A. §§ 3591 et seq. 195 A.L.R. Fed. 1.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 888, 889.

CJS.

24 C.J.S., Criminal Law §§ 2192, 2193.

Law Reviews.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

§ 99-19-53. Execution of death sentence; state executioner.

The state executioner, or his duly authorized representative, shall supervise and inflict the punishment of death as the same is hereby provided. All duties and necessary acts pertaining to the execution of a convict shall be performed by the commissioner of corrections except where such duties and actions are vested in the state executioner. The state executioner shall receive for his services in connection therewith compensation in the sum of five hundred dollars ($500.00) plus all actual and necessary expenses for each such execution, to be paid by the county where the crime was committed. The county of conviction shall likewise pay the fees of the attending physician or physicians in attendance. The executioner may appoint not more than two (2) deputies who shall be paid one hundred fifty dollars ($150.00) per execution and mileage as authorized by law, to be paid by the county where the crime was committed, to assist in the infliction of the punishment of death. The executioner may appoint such other assistants as may be required; however, such assistants shall not be entitled to compensation or travel expenses.

Any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by law shall not be construed to be the practice of medicine or nursing. Any pharmacist is authorized to dispense drugs to the state executioner without a prescription for the purpose of this chapter.

The state executioner shall be custodian of all equipment and supplies involved in the infliction of the death penalty. All expenses for the maintenance and protection of the property, together with operating expenses, which as a practical matter cannot be allocated to the county of conviction, shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The state executioner shall receive the per diem compensation authorized in Section 25-3-69 in addition to actual and necessary expenses, including mileage as authorized by law, for each day, not to exceed three (3) days each month, spent in maintaining the equipment and supplies involved in the infliction of the death penalty or preparing for an execution which does not occur. Such payments shall be paid out of funds designated by law for that purpose or out of the general support fund of the Mississippi Department of Corrections.

The governor shall appoint the official state executioner who shall serve at the pleasure of the governor and until his successor shall have been duly appointed to replace him.

HISTORY: Codes, 1942, § 2555; Laws, 1940, ch. 242; Laws, 1954, ch. 220, § 3; Laws, 1954, Ex. ch. 33, § 2; Laws, 1955, Ex. ch. 41, § 2; Laws, 1968, ch. 361, § 62; Laws, 1984, ch. 448, § 3, eff from and after July 1, 1984.

Cross References — Exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

A similar provision excepting infliction of death sentence from definition as and regulation as practice of nursing, see § 73-15-7.

Infliction of death sentence by intravenous injection of drugs or by lethal gas, see § 99-19-51.

Procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

JUDICIAL DECISIONS

1. Execution protocol.

Mississippi Department of Corrections (MDOC) execution protocol is a "regulation or statement" related only to inmates of the MDOC and is therefore exempt from the provisions of the Mississippi Administrative Procedures Law (MAPL); the protocol is an internal policy concerning lethal injections and the manner in which executions are carried out and is therefore not subject to the notice and comment requirements of the MAPL. Mississippians Educating for Smart Justice, Inc. v. Miss. Dep't of Corr., 98 So. 3d 459, 2012 Miss. LEXIS 409 (Miss. 2012).

Execution protocol of the Mississippi

Department of Corrections (MDOC) was exempt from the provisions of the Mississippi Administrative Procedures Law (MAPL) under Miss. Code Ann. § 25-53-102(i)(ii)(6) because it was a "regulation or statement" related only to inmates of the MDOC at a specific facility and did not affect any provision of Miss. Code Ann. § 99-19-55 or alter Miss. Code Ann. § 99-19-51; the protocol was not subject to the notice and comment requirements of the MAPL because it was an internal policy concerning lethal injections and the manner in which executions were carried out. Mississippians Educating for Smart Justice, Inc. v. Miss. Dep't of Corr., 98 So. 3d 459, 2012 Miss. LEXIS 409 (Miss. 2012).

RESEARCH REFERENCES

Law Reviews.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

§ 99-19-55. Execution of death sentence; procedure; witnesses; certificate of execution; disposition of body.

(1) Whenever any person shall be condemned to suffer death for any crime for which such person shall have been convicted in any court of any county of this state, such punishment shall be inflicted at 6:00 p.m. or as soon as possible thereafter within the next twenty-four (24) hours at an appropriate place designated by the Commissioner of Corrections on the premises of the Mississippi State Penitentiary at Parchman, Mississippi. All male persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the Department of Corrections and transported to the maximum security cell block at the Mississippi State Penitentiary at Parchman, Mississippi. When the maximum inmate capacity at such maximum security cell block has been reached, the Commissioner of Corrections shall place such male convicts in an appropriate facility on the grounds of the Mississippi State Penitentiary at Parchman, Mississippi. All female persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the Department of Corrections and housed in an appropriate facility designated by the Commissioner of Corrections. Upon final affirmance of the conviction, the punishment shall be imposed in the manner provided by law. The State Executioner or his duly authorized deputy shall supervise and perform such execution.

(2) When a person is sentenced to suffer death in the manner provided by law, it shall be the duty of the clerk of the court to deliver forthwith to the Commissioner of Corrections a warrant for the execution of the condemned person. It shall be the duty of the commissioner forthwith to notify the State Executioner of the date of the execution and it shall be the duty of the said State Executioner, or any person deputized by him in writing, in the event of his physical disability, as hereinafter provided, to be present at such execution, to perform the same, and have general supervision over said execution. In addition to the above designated persons, the Commissioner of Corrections shall secure the presence at such execution of the sheriff, or his deputy, of the county of conviction, at least one (1) but not more than two (2) physicians or the county coroner where the execution takes place, and bona fide members of the

press, not to exceed eight (8) in number, and at the request of the condemned, such ministers of the gospel, not exceeding two (2), as said condemned person shall name. The Commissioner of Corrections shall also name to be present at the execution such officers or guards as may be deemed by him to be necessary to insure proper security. No other persons shall be permitted to witness the execution, except the commissioner may permit two (2) members of the condemned person's immediate family as witnesses, if they so request and two (2) members of the victim's immediate family as witnesses, if they so request. Provided further, that the Governor may, for good cause shown, permit two (2) additional persons of good and reputable character to witness an execution. No person shall be allowed to take photographs or other recordings of any type during the execution. The absence of the sheriff, or deputy, after due notice to attend, shall not delay the execution.

(3) The State Executioner, or his duly authorized representative, the Commissioner of Corrections, or his duly authorized representative, and the physician or physicians or county coroner who witnessed such execution shall prepare and sign officially a certificate setting forth the time and place thereof and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of Sections 99-19-51 through 99-19-55, and shall procure the signatures of the other public officers and persons who witnessed such execution, which certificate shall be filed with the clerk of the court where the conviction of the criminal was had, and the clerk shall subjoin the certificate to the record of the conviction and sentence.

(4) The body of the person so executed shall be released immediately by the State Executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body. The Commissioner of Corrections shall have sole charge of burial in the event the body is not claimed as aforesaid, and his discretion in the premises shall be final. The Commissioner may donate the unclaimed body of an executed person to the University of Mississippi Medical Center for scientific purposes. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends or donated to the University of Mississippi Medical Center.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(25); 1857, ch. 64, art. 324; 1871, § 2817; 1880, § 3092; 1892, § 1448; 1906, § 1521; Hemingway's 1917, § 1283; 1930, § 1308; 1942, § 2551; Laws, 1924, ch. 229; Laws, 1940, ch. 242; Laws, 1954, ch. 220, § 2; Laws, 1954, Ex. ch. 33, § 1; Laws, 1955, Ex. ch. 41, § 1; Laws, 1984, ch. 448, § 4; Laws, 1994, ch. 479, § 2; Laws, 1998, ch. 361, § 1, eff from and after July 1, 1998.

Cross References — Disposition of unclaimed bodies generally, see § 41-39-5.

Autopsies on bodies of prisoners, generally, see § 47-5-151.

Exception that execution of a defendant is not subject to a provision that death of a prisoner be investigated, etc., see § 47-5-151.

Manner of execution of death sentence, see § 99-19-51.

Confidentiality of identities of members of execution team, supplier of lethal injection chemicals and witnesses listed in subsection (2) of this section, see § 99-19-51.

State executioner generally, see § 99-19-53.

Procedures regarding pregnant women awaiting execution of death sentence, see § 99-19-57.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

JUDICIAL DECISIONS

1. Execution protocol.

Mississippi Department of Corrections (MDOC) execution protocol is a "regulation or statement" related only to inmates of the MDOC and is therefore exempt from the provisions of the Mississippi Administrative Procedures Law (MAPL); the protocol is an internal policy concerning lethal injections and the manner in which executions are carried out and is therefore not subject to the notice and comment requirements of the MAPL. Mississippians Educating for Smart Justice, Inc. v. Miss. Dep't of Corr., 98 So. 3d 459, 2012 Miss. LEXIS 409 (Miss. 2012).

Execution protocol of the Mississippi Department of Corrections (MDOC) was exempt from the provisions of the Mississippi Administrative Procedures Law (MAPL) under Miss. Code Ann. § 25-53-102(i)(ii)(6) because it was a "regulation or statement" related only to inmates of the MDOC at a specific facility and did not affect any provision of Miss. Code Ann. § 99-19-55 or alter Miss. Code Ann. § 99-19-51; the protocol was not subject to the notice and comment requirements of the MAPL because it was an internal policy concerning lethal injections and the manner in which executions were carried out. Mississippians Educating for Smart Justice, Inc. v. Miss. Dep't of Corr., 98 So. 3d 459, 2012 Miss. LEXIS 409 (Miss. 2012).

RESEARCH REFERENCES

ALR.

Validity of rules and regulations concerning viewing of execution of death penalty. 107 A.L.R.5th 291.

Am. Jur.

21A Am. Jur. 2d, Criminal Law §§ 956 et seq.

CJS.

24B C.J.S., Criminal Law §§ 2002, 2003.

Law Reviews.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

§ 99-19-57. Execution of death sentence; suspension of sentence when offender is pregnant or a person with mental illness.

(1) If the Commissioner of Corrections at any time is satisfied that any female offender in his custody under sentence of death is pregnant, he shall summon a physician to inquire into the pregnancy. The commissioner shall summons and swear all necessary witnesses and the commissioner after full examination shall certify under his hand what the truth may be in relation to the alleged pregnancy, and in case the offender is found to be pregnant, the commissioner shall immediately transmit his findings to the Governor, and the Governor shall suspend the execution of the sentence until he is satisfied that the offender is not or is no longer pregnant. The Governor shall then order, by his warrant to the commissioner, the execution of the offender on a day to be

appointed by the Governor according to the sentence and judgment of the court.

(2)(a) If it is believed that an offender under sentence of death has become mentally ill since the judgment of the court, the following shall be the exclusive procedural and substantive procedure. The offender, or a person acting as his next friend, or the Commissioner of Corrections may file an appropriate application seeking post-conviction relief with the Mississippi Supreme Court. If it is found that the offender is a person with mental illness, as defined in this subsection, the court shall suspend the execution of the sentence. The offender shall then be committed to the forensic unit of the Mississippi State Hospital at Whitfield. The order of commitment shall require that the offender be examined and a written report be furnished to the court at that time and every month thereafter, stating whether there is a substantial probability that the offender will become sane under this subsection within the foreseeable future and whether progress is being made toward that goal. If at any time during the commitment, the appropriate official at the state hospital considers the offender to be sane under this subsection, the official shall promptly notify the court to that effect in writing and place the offender in the custody of the Commissioner of Corrections. The court then shall conduct a hearing on the sanity of the offender. The finding of the circuit court is a final order appealable under the terms and conditions of the Mississippi Uniform Post-Conviction Collateral Relief Act.

(b) For the purposes of this subsection, a person shall be deemed to be a person with mental illness if the court finds that the offender does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, and a sufficient understanding to know any fact that might exist that would make his punishment unjust or unlawful and the intelligence requisite to convey that information to his attorneys or the court.

HISTORY: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(15-21); 1857, ch. 64, art. 326; 1871, § 2819; 1880, § 3094; 1892, § 1450; 1906, § 1523; Hemingway's 1917, § 1285; 1930, § 1310; 1942, § 2558; Laws, 1926, ch. 186; Laws, 1984, ch. 448, § 5; Laws, 2008, ch. 442, § 39, eff from and after July 1, 2008.

Cross References — Pretrial insanity proceedings, see §§ 99-13-1 et seq.

Confinement of female prisoners sentenced to death, see § 99-19-55.

Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Procedural effect of final order in post-conviction collateral relief proceeding, see § 99-39-23.

Procedural effect of dismissal or denial of application for leave to proceed in trial court for post-conviction collateral relief, see § 99-39-27.

Stay of death penalty execution under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-29.

JUDICIAL DECISIONS

1. In general.

In a habeas corpus case in which a federal district court determined that a state inmate was mentally incompetent to be executed for three murders, the inmate would be discharged from imprisonment, but the appropriate officials of the State of Mississippi were ordered to suspend his death sentence and transfer him to the Mississippi State Hospital under the provisions of Miss. Code Ann. § 99-19-57. Billiot v. Epps, 671 F. Supp. 2d 840, 2009 U.S. Dist. LEXIS 104153 (S.D. Miss. 2009), amended, 2010 U.S. Dist. LEXIS 47589 (S.D. Miss. Apr. 13, 2010).

A post-conviction relief petitioner was not entitled to de novo review on appeal from a ruling that he was competent to be executed where the trial judge stated that he relied on subsection (2)(b) of this section and Ford v. Wainwright (1985, US) 91 L. Ed. 2d 335, 106 S. Ct. 2595 in determining the petitioner's competency, and that the petitioner failed to prove by a preponderance of the evidence that he was not competent to be executed; the petitioner was afforded due process and the trial judge's ruling could only be reversed if it were against the overwhelming weight of the evidence or an abuse of discretion. Billiot v. State, 655 So. 2d 1, 1995 Miss. LEXIS 88 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762, 1996 U.S. LEXIS 787 (U.S. 1996).

Intelligence is a relevant factor to consider in a competency hearing; it is conceivable that one could be so intellectually deficient that he or she could not possibly comprehend the crime, have a rational understanding of what it means to be executed, have the ability to rationally connect the crime with the execution, or have the ability to assist counsel. Billiot v. State, 655 So. 2d 1, 1995 Miss. LEXIS 88 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762, 1996 U.S. LEXIS 787 (U.S. 1996).

This section does not unconstitutionally restrict rights of defendants, as it is harmonious with the import of the Eighth Amendment prohibition against cruel and unusual punishment as interpreted in Ford v. Wainwright (1985, US) 91 L. Ed. 2d 335, 106 S. Ct. 2595. Billiot v. State, 655 So. 2d 1, 1995 Miss. LEXIS 88 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762, 1996 U.S. LEXIS 787 (U.S. 1996).

The execution of a defendant who had been repeatedly diagnosed as a chronic paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. Billiot v. State, 655 So. 2d 1, 1995 Miss. LEXIS 88 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762, 1996 U.S. LEXIS 787 (U.S. 1996).

Imposition of the death penalty was not improper on the grounds that the defendant had an I.Q. of 61, had been plagued in the past with experiencing hallucinations, had gone on destructive rampages, had on 2 prior occasions been placed in mental institutions, and was an alcoholic and a chronic drug abuser. Since the defendant suffered only from minor mental disabilities, his disabilities did not bar execution. Lanier v. State, 533 So. 2d 473, 1988 Miss. LEXIS 523 (Miss. 1988).

Defendant was entitled to in-court opportunity to prove his claims of present insanity where he had presented allegations under oath which, if true, brought into serious question legality of execution under both state and federal law; defendant had presented court with application for relief backed by affidavits of 3 mental health professionals. Billiot v. State, 515 So. 2d 1234, 1987 Miss. LEXIS 2914 (Miss. 1987).

Affidavits of clinical psychologists and psychiatrists failed to establish reasonable probability that defendant was insane, where he alleged insanity as bar to his execution on grounds of cruel and unusual punishment. Johnson v. State, 508 So. 2d 1126, 1987 Miss. LEXIS 2588 (Miss. 1987).

State is prohibited by Eighth Amendment from inflicting death penalty on prisoner who is insane. Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91

L. Ed. 2d 335, 1986 U.S. LEXIS 64 (U.S. 1986).

State is not required to resolve death row inmate's claim that he has become insane since his conviction, warranting stay of his execution under subsection (2) of this section by means of formal trial, as state may properly presume that inmate, who in order to have been convicted and sentenced must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise serious question for trial court, that inmate's mental state remains same at time sentence is to be carried out, and that allegation of change of mental state requires substantial threshold showing of insanity merely to trigger hearing process, and constitutionally acceptable procedure requires only that state provide impartial hearing officer or board that can receive evidence from prisoner's counsel, including expert psychiatric evidence that may differ from state's own psychiatric evidence. Johnson v. Cabana, 818 F.2d 333, 1987 U.S. App. LEXIS 7211 (5th Cir. Miss. 1987).

Finding at trial that criminal defendant is presently sane is res judicata as to issue of present sanity of convicted defendant under sentence of death where defendant claims that present mental condition stems from that existing prior to time of offense and trial. Billiot v. State, 478 So. 2d 1043, 1985 Miss. LEXIS 2304 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (U.S. 1986).

This section [Code 1942, § 2558] is not the exclusive remedy to have execution of convicted murderer stayed on the ground that he was insane. Musselwhite v. State, 215 Miss. 363, 60 So. 2d 807, 1952 Miss. LEXIS 574 (Miss. 1952).

On petition to stay execution of a murderer on the ground that he was insane, technical perfection of pleading was not required. Musselwhite v. State, 215 Miss. 363, 60 So. 2d 807, 1952 Miss. LEXIS 574 (Miss. 1952).

On a petition for stay of execution of a convicted murderer on the ground that he was insane, the trial judge before whom the accused was convicted and sentenced, should not have limited the stay of execution to periods pending appeal but should have stayed execution until the convicted murderer should be adjudged sane. Musselwhite v. State, 215 Miss. 363, 60 So. 2d 807, 1952 Miss. LEXIS 574 (Miss. 1952).

In proceeding for order fixing date for execution of death sentence, convict could present answer or suggestion of insanity. Lewis v. State, 155 Miss. 810, 125 So. 419, 1930 Miss. LEXIS 126 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

Propriety of imposing capital punishment on mentally retarded individuals. 20 A.L.R.5th 1.

Downward departure from United States Sentencing Guidelines (USSG §§ 1A1.1 et seq.) based on aberrant behavior. 164 A.L.R. Fed. 61.

Am. Jur.

21 Am. Jur. 2d, Criminal Law §§ 110 et seq.

CJS.

24 C.J.S., Criminal Law §§ 2142, 2194.

Law Reviews.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

Smith, The insanity plea in Mississippi: a primer and a proposal. 10 Miss. C. L. Rev. 147, Spring, 1990.

§ 99-19-59. Repealed.

Repealed by Laws, 1984, ch. 448, § 10, eff from and after July 1, 1984.

§ 99-19-59. [Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(22); 1857, ch.

64, art. 327; 1871, § 2820; 1880, § 3095; 1892, § 1451; 1906, § 1524; Hemingway's 1917, § 1286; 1930, § 1311; 1942, § 2559]

Editor's Notes — Former § 99-19-59 was entitled: Execution of death sentence; procedure when execution does not take place as ordered.

§ 99-19-61. Cost of trial and/or execution of one committing crime within confines of penitentiary, or of inmate committing crime outside bounds of penitentiary.

The commissioner of corrections is hereby authorized and empowered to pay out of any available funds of the department of corrections all lawful costs, fees, and expenses and/or the costs of the execution of any person, not a legal resident of Sunflower County, Mississippi, who is charged, tried and/or executed for the commission of a crime within the confines of the penitentiary, or any crime committed outside the bounds of the land of the penitentiary by any inmate lawfully charged thereto. Such costs shall include the reasonable expense of burial in the event the person is executed and the body is not claimed by relatives or friends, and any and all other expenses required to be borne by the state of Mississippi under the provisions of Sections 99-19-53 and 99-19-55. It is intended hereby to provide a means and method and source of payment of such expenses which said sections require to be borne by the state.

HISTORY: Codes, 1942, § 2559.5; Laws, 1955, Ex. ch. 44; Laws, 1964, ch. 359; Laws, 1984, ch. 448, § 6, eff from and after July 1, 1984.

Cross References — Payment of costs of criminal prosecutions generally, see Miss Const Art. 14, § 261.

Disposition of unclaimed bodies generally, see § 41-39-5.

Disposition of body following execution of death sentence generally, see § 99-19-55.

§ 99-19-63. Repealed.

Repealed by Laws, 1980, ch. 555, § 9, eff rom and after July 1, 1980.

§ 99-19-63. [Codes, 1942, § 2611.5; Laws, 1962, ch. 299, §§ 1-4; Laws, 1964, ch. 360, §§ 1-5]

Editor's Notes — Former § 99-19-63 was entitled: Report of certain convictions. For Mississippi Justice Information Center and current provisions regarding maintenance and submission of records, fingerprints, photographs and other data, see §§ 45-27-1 et seq.

§ 99-19-65. Collection of fines, penalties, and list reported.

The clerk of the circuit court shall, immediately after the adjournment of every term, issue execution according to the nature of the case, for all fines, penalties and forfeitures assessed by the court, or which shall have accrued to the state or to the county, and remaining due and unpaid. Said clerk shall, within thirty days after such adjournment, transmit a list of said executions to the clerk of the board of supervisors of the county, noting the names of the defendants, the amounts, and the sheriff or other officer to whom the same was delivered; and, at the same time he shall transmit to said clerk a statement of the returns made by the sheriff or other officer on execution for fines, penalties, and forfeitures returnable to the last term of the court. Any circuit court clerk who shall fail to issue such executions, or to transmit the lists thereof as required, shall forfeit and pay the sum of two hundred dollars for every such offense, to be recovered by the state or county, on motion against him and his sureties by the district attorney, before the circuit court. The clerk of the board of supervisors shall notify the district attorney of such default.

HISTORY: Codes, 1857, ch. 61, art 304; 1871, § 867; 1880, § 1785; 1892, § 764; 1906, § 826; Hemingway's 1917, § 614; 1930, § 618; 1942, § 1562.

Cross References — Duty of clerk of justice court to collect and report fines, see § 9-11-19.

Duty of clerk of board of supervisors, see § 19-3-27.

Duty of district attorney as to fines and penalties, see § 25-31-23.

Imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for certain violations, misdemeanors and felonies, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

15A Am. Jur. 2d, Clerks of Court §§ 52, 53, 54, 61.

CJS.

21 C.J.S., Courts §§ 333, 334 et seq.

§ 99-19-67. Remedy against officer, in reference to fines.

If any sheriff or other officer shall return on any such writ of execution, that he hath levied the fine, penalty, or forfeiture therein mentioned, or any part thereof; or, that he hath taken the body of the defendant, and shall have suffered such defendant to escape; or, if any person be committed to the custody of such sheriff or other officer until the fine, penalty, or forfeiture for which he was committed shall be paid, and such sheriff or officer shall permit such defendant to escape; or, if such sheriff or officer shall have received such fine, penalty, or forfeiture, or any part thereof, and shall not immediately account to the clerk of the board of supervisors and pay the same into the treasury of the county, then, in either of the cases above specified, it shall be the duty of said clerk to notify the district attorney of such default, who shall thereupon, on motion at the next term of the circuit court, demand judgment against such sheriff, or other officer, and his sureties, for the fines, penalties, and forfeitures mentioned in such writs, or for so much thereof as he shall have received on such execution or commitment, or the whole amount thereof in case he shall have suffered such defendant or defendants to escape; and the court shall give judgment accordingly, and award execution thereon.

HISTORY: Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; 1906, § 828; Hemingway's 1917, § 616; 1930, § 619; 1942, § 1563.

Cross References — Liability of clerk of justice court for money collected, see § 9-11-23.

Another section derived from same 1942 code section, see § 11-7-219.

Failure of constable to execute and return execution, see § 19-19-9.

Liability of sheriff for mishandling money collected, see § 19-25-39 et seq.

Remedies against persons having custody of convict for escape of prisoner, see § 97-9-35.

Imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for certain violations, misdemeanors and felonies, see § 99-19-73.

RESEARCH REFERENCES

Am. Jur.

63C Am. Jur. 2d, Public Officers and Employees §§ 389 et seq.

CJS.

67 C.J.S., Officers and Public Employees §§ 363, 364 et seq.

§ 99-19-69. Liability of officers for default as to fines.

Clerks, sheriffs, and other officers shall be liable to the same proceedings for any neglect of duty, in respect to executions for fines, penalties, and forfeitures, as in case of executions in civil cases.

HISTORY: Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; 1906, § 828; Hemingway's 1917, § 616; 1930, § 620; 1942, § 1564.

Cross References — Motions against officers for money collected, see § 9-7-89.

Liability of officers for default as to fines in civil cases, see § 11-7-221.

Imposition of fine on persons convicted of offense punishable by more than 1 year of imprisonment, see § 99-19-32.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for certain violations misdemeanors and felonies, see § 99-19-73.

§ 99-19-71. Expunction of misdemeanor conviction of first offender upon petition; expunction of certain felony convictions upon petition.

(1) Any person who has been convicted of a misdemeanor that is not a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.

(2)(a) Except as otherwise provided in this subsection, a person who has been convicted of a felony and who has paid all criminal fines and costs of court imposed in the sentence of conviction may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction upon a hearing as determined in the discretion of the court; however, a person is not eligible to expunge a felony classified as:

(i) A crime of violence as provided in Section 97-3-2;

(ii) Arson, first degree as provided in Sections 97-17-1 and 97-17-3;

(iii) Trafficking in controlled substances as provided in Section 41-29-139;

(iv) A third, fourth or subsequent offense DUI as provided in Section 63-11-30(2)(c) and (2)(d);

(v) Felon in possession of a firearm as provided in Section 97-37-5;

(vi) Failure to register as a sex offender as provided in Section 45-33-33;

(vii) Voyeurism as provided in Section 97-29-61;

(viii) Witness intimidation as provided in Section 97-9-113;

(ix) Abuse, neglect or exploitation of a vulnerable person as provided in Section 43-47-19; or

(x) Embezzlement as provided in Sections 97-11-25 and 97-23-19.

A person is eligible for only one (1) felony expunction under this paragraph. For the purposes of this section, the terms "one (1) conviction" and "one (1) felony expunction" mean and include all convictions that arose from a common nucleus of operative facts as determined in the discretion of the court.

(b) The petitioner shall give ten (10) days' written notice to the district attorney before any hearing on the petition. In all cases, the court wherein the petition is filed may grant the petition if the court determines, on the record or in writing, that the applicant is rehabilitated from the offense which is the subject of the petition. In those cases where the court denies the petition, the findings of the court in this respect shall be identified specifically and not generally.

(3) Upon entering an order of expunction under this section, a nonpublic record thereof shall be retained by the Mississippi Criminal Information Center solely for the purpose of determining whether, in subsequent proceedings, the person is a first offender. The order of expunction shall not preclude a district attorney's office from retaining a nonpublic record thereof for law enforcement purposes only. The existence of an order of expunction shall not preclude an employer from asking a prospective employee if the employee has had an order of expunction entered on his behalf. The effect of the expunction order shall be to restore the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted. No person as to whom an expunction order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest, indictment or conviction in response to any inquiry made of him for any purpose other than the purpose of determining, in any subsequent proceedings under this section, whether the person is a first offender. A person as to whom an order has been entered, upon request, shall be required to advise the court, in camera, of the previous conviction and expunction in any legal proceeding wherein the person has been called as a prospective juror. The court shall thereafter and before the selection of the jury advise the attorneys representing the parties of the previous conviction and expunction.

(4) Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case, or the person was found not guilty at trial.

(5) No public official is eligible for expunction under this section for any conviction related to his official duties.

HISTORY: Laws, 1986, ch. 412; Laws, 1987, ch. 380, § 2; Laws, 1996, ch. 454, § 5; Laws, 2003, ch. 557, § 4; Laws, 2010, ch. 460, § 1; Laws, 2013, ch. 557, § 1; Laws, 2015, ch. 448, § 2, eff from and after July 1, 2015; Laws, 2019, ch. 428, § 5, eff from and after July 1, 2019; Laws, 2019, ch. 466, § 34, eff from and after July 1, 2019.

Joint Legislative Committee Note — Section 5 of Chapter 428, Laws of 2019, effective July 1, 2019 (approved March 29, 2019), amended this section. Section 34 of Chapter 466, Laws of 2019, effective July 1, 2019 (approved April 16, 2019), also amended this section. As set out above, this section reflects the language of Section 34 of Chapter 466, Laws of 2019, which contains language that specifically provides that it supersedes § 99-19-71 as amended by Chapter 428, Laws of 2019.

Editor's Notes — Laws of 2010, ch. 460, § 3, provides:

"SECTION 3. This act shall take effect and be in force from and after July 1, 2010, and the provisions of this act shall be considered additional and supplemental to any other relief."

Section 4, Chapter 448, Laws of 2015, provides:

"SECTION 4. Sections 1 and 2 of this act shall take effect and be in force from and after July 1, 2015. Section 3 of this act shall take effect and be in force from and after its passage [approved April 20, 2015]."

Laws of 2019, ch. 466, § 1, provides as follows:

"SECTION 1. This act shall be known and may be cited as the 'Criminal Justice Reform Act.' "

Amendment Notes — The first 2019 amendment (ch. 428) inserted "larceny of consigned motor fuels under Section 97-17-207" in (2)(a).

The second 2019 amendment (ch. 466) divided former (2)(a) into two paragraphs; in the first paragraph of (2)(a), rewrote the first sentence, which read: "Any person who has been convicted of one (1) of the following felonies may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction: a bad check offense under Section 97-19-55; possession of a controlled substance or paraphernalia under Section 41-29-139(c) or (d); false pretense under Section 97-19-39; larceny under Section 97-17-41; malicious mischief under Section 97-17-67; or shoplifting under Section 97-23-93," and added (i) through (x); in the second paragraph of (2)(a), added the last sentence; deleted former (2)(b), which related to expunction of certain felonies committed by persons under the age of 21, and redesignated former (2)(c) as (2)(b); and added "or the person was found not guilty at trial" at the end of (4).

Cross References — Other provisions relative to expunction of records, see §§ 21-23-7, 41-29-150, 43-21-159.

Application of this section to the powers of the municipal court to expunge a misdemeanor conviction occurring prior to a person's 23rd birthday, see § 21-23-7.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Effect of pardon.

1. In general.

Because petitioner was twenty-seven when he entered his three guilty pleas in 1979, none of those convictions were eligible for expungement under subsection (2)(b); all of petitioner's convictions were related to selling a controlled substance. Clay v. State, 232 So. 3d 196, 2017 Miss. App. LEXIS 287 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 503 (Miss. 2017), cert. denied, 229 So. 3d 714, 2017 Miss. LEXIS 513 (Miss. 2017).

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of Mississippi has specifically authorized expungment of criminal offender records in limited cases-youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungment of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that any person who pled guilty within 6 months prior to the effective date of § 99-15-26 (March 31, 1983) may apply to the court for an order expunging his or her criminal records. Under §§ 99-15-57 and 99-15-26 a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to §§ 99-15-57 and 99-15-26 if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the "within 6 months prior to" March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the criterion in any of the statutes authorizing expungment, and thus the trial court did not err in denying his petition for expungment. Caldwell v. State, 564 So. 2d 1371, 1990 Miss. LEXIS 262 (Miss. 1990).

Because there is no statutory basis in Mississippi for an expungement after a criminal defendant receives an executive pardon, the trial court did not err in denying appellant's motion to expunge her criminal record. Hentz v. State, 152 So. 3d 1139, 2014 Miss. LEXIS 591 (Miss. 2014).

2. Effect of pardon.

In a case where defendant was pardoned by the Governor, the circuit court did not err in denying her motion to have her record expunged under this statute because defendant entered a guilty plea and was sentenced; the pardon did not erase her conviction or make it as if the charges were dropped and there was no disposition of the case; and no statutory authority provided for expungement of a criminal record after a pardon. Robertson v. State, 158 So. 3d 280, 2015 Miss. LEXIS 35 (Miss. 2015).

OPINIONS OF THE ATTORNEY GENERAL

The statute does not apply to allow the expunction of pretrial intervention records. Spann, March 17, 2000, A.G. Op. #2000-0106.

Section 99-19-71(1) allows the court some discretion in granting an expungement; subsection (2) of the statute is mandatory and the court does not have discretion in granting an expungement under those circumstances. Carson, May 9, 2003, A.G. Op. 03-0211.

Once an offense has been expunged, it cannot be used to enhance a penalty for a subsequent offense. Carson, May 9, 2003, A.G. Op. 03-0211.

The term "first offender" as used in this section means an individual who has no prior non-traffic convictions of any offense. Mitchell, Oct. 24, 2003, A.G. Op. 03-0566.

Any person who is a first offender, regardless of age at the time of their conviction, may petition the municipal court for expungement of a misdemeanor conviction occurring in that court. Davis, Apr. 1, 2005, A.G. Op. 05-0152.

RESEARCH REFERENCES

ALR.

Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute. 68 A.L.R.6th 1.

Judicial Expunction of Criminal Record of Convicted Adult Under Statute – General Principles, and Expunction of Criminal Records Under Statutes Providing for Such Relief Where Criminal Proceeding Is Terminated in Favor of Defendant, upon Completion of Probation, upon Suspended Sentence, and Where Expungement Relief Predicated upon Type, and Number, of Offenses. 69 A.L.R.6th 1.

Judicial Expunction of Criminal Record of Convicted Adult Under Statute-Expunction Under Statutes Addressing "First Offenders" and "Innocent Persons," Where Conviction Was for Minor Drug or Other Offense, Where Indictment Has Not Been Presented Against Accused or Accused Has been Released from Custody, and Where Court Considered Impact of *Nolle Prosequi,* Partial Dismissal, Pardon, Rehabilitation, and Lesser-Included Offenses. 70 A.L.R.6th 1.

§ 99-19-72. Filing fee for petition to expunge certain first offenses; distribution of fees collected.

(1) A filing fee of One Hundred Fifty Dollars ($150.00) is hereby levied on each petition to expunge an offense under Section 99-19-71 to be collected by the circuit clerk and distributed as follows:

(a) One Hundred Dollars ($100.00) to be deposited into the Judicial System Operation Fund;

(b) Forty Dollars ($40.00) to be deposited into the District Attorneys Operation Fund; and

(c) Ten Dollars ($10.00) to be retained by the circuit clerk collecting the fee for administration purposes.

(2) From and after July 1, 2016, the expenses of district attorneys shall be defrayed by appropriation from the State General Fund and all user charges and fees authorized by paragraphs (a) and (b) of subsection (1) of this section shall be deposited into the State General Fund as authorized by law and as determined by the State Fiscal Officer, and charges and fees authorized by paragraph (c) of subsection (1) of this section shall be retained by the circuit clerks for expenditures authorized by law.

HISTORY: Laws, 2010, ch. 561, § 1; Laws, 1st Ex Sess, 2017, ch. 7, § 12, eff from and after passage (approved June 23, 2017).

Cross References — User charges and fees authorized by subsection (1)(a) and (b) of this section to be deposited in State General Fund, see § 25-31-41.

User charges and fees authorized by subsection (1)(c) of this section to be retained by the circuit clerks for expenditures authorized by law, see § 25-31-41.

§ 99-19-73. Standard State monetary assessment for certain violations, misdemeanors and felonies; suspension or reduction of assessment prohibited; collection and deposit of assessments; refunds.

(1) **Traffic violations.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any violation in Title 63, Mississippi Code of 1972, except offenses relating to the Mississippi Implied Consent Law (Section 63-11-1 et seq.) and offenses relating to vehicular parking or registration:

FUND	AMOUNT
State Court Education Fund	[Deleted]
State Prosecutor Education Fund	[Deleted]
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	[Deleted]
Child Support Prosecution Trust Fund	[Deleted]
Driver Training Penalty Assessment Fund	[Deleted]
Law Enforcement Officers Training Fund	[Deleted]
Spinal Cord and Head Injury Trust Fund (for all moving violations)	[Deleted]
Emergency Medical Services Operating Fund	[Deleted]
Mississippi Leadership Council on Aging Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	[Deleted]
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	[Deleted]
Crisis Intervention Mental Health Fund	[Deleted]
Intervention Court Fund	[Deleted]
Judicial Performance Fund	[Deleted]
Capital Defense Counsel Fund	[Deleted]
Indigent Appeals Fund	[Deleted]
Capital Post-Conviction Counsel Fund	[Deleted]
Victims of Domestic Violence Fund	[Deleted]
Public Defenders Education Fund	[Deleted]
Domestic Violence Training Fund	[Deleted]
Attorney General's Cyber Crime Unit	[Deleted]
Children's Safe Center Fund	[Deleted]
DuBard School for Language Disorders Fund	[Deleted]
Children's Advocacy Centers Fund	[Deleted]
Judicial System Operation Fund	[Deleted]
GENERAL FUND	$90.50

(2) **Implied Consent Law violations.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or any other penalty for any violation of the Mississippi Implied Consent Law (Section 63-11-1 et seq.):

FUND	AMOUNT
Crime Victims' Compensation Fund	[Deleted]
State Court Education Fund	[Deleted]
State Prosecutor Education Fund	[Deleted]
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	[Deleted]
Child Support Prosecution Trust Fund	[Deleted]
Driver Training Penalty Assessment Fund	[Deleted]
Law Enforcement Officers Training Fund	[Deleted]
Emergency Medical Services Operating Fund	[Deleted]
Mississippi Alcohol Safety Education Program Fund	[Deleted]
Federal-State Alcohol Program Fund	[Deleted]
Mississippi Forensics Laboratory Implied Consent Law Fund	[Deleted]
Spinal Cord and Head Injury Trust Fund	[Deleted]
Capital Defense Counsel Fund	[Deleted]
Indigent Appeals Fund	[Deleted]
Capital Post-Conviction Counsel Fund	[Deleted]
Victims of Domestic Violence Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	[Deleted]
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	[Deleted]
Crisis Intervention Mental Health Fund	[Deleted]
Intervention Court Fund	[Deleted]
Statewide Victims' Information and Notification System Fund	[Deleted]
Public Defenders Education Fund	[Deleted]
Domestic Violence Training Fund	[Deleted]
Attorney General's Cyber Crime Unit	[Deleted]
GENERAL FUND	$243.50

(3) **Game and Fish Law violations.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any violation of the game and fish statutes or regulations of this state:

FUND	AMOUNT
State Court Education Fund	[Deleted]
State Prosecutor Education Fund	[Deleted]
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	[Deleted]
Law Enforcement Officers Training Fund	[Deleted]
Hunter Education and Training Program Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	[Deleted]
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	[Deleted]
Crisis Intervention Mental Health Fund	[Deleted]
Intervention Court Fund	[Deleted]
Capital Defense Counsel Fund	[Deleted]
Indigent Appeals Fund	[Deleted]
Capital Post-Conviction Counsel Fund	[Deleted]
Victims of Domestic Violence Fund	[Deleted]
Public Defenders Education Fund	[Deleted]
Domestic Violence Training Fund	[Deleted]
Attorney General's Cyber Crime Unit	[Deleted]
GENERAL FUND	$89.00

(4) [Deleted]

(5) **Speeding, reckless and careless driving violations.** In addition to any assessment imposed under subsection (1) or (2) of this section, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for driving a vehicle on a road or highway:

(a) At a speed that exceeds the posted speed limit by at least ten (10) miles per hour but not more than twenty (20) miles per hour	$10.00
(b) At a speed that exceeds the posted speed limit by at least twenty (20) miles per hour but not more than thirty (30) miles per hour	$20.00
(c) At a speed that exceeds the posted speed limit by thirty (30) miles per hour or more	$30.00
(d) In violation of Section 63-3-1201, which is the offense of reckless driving	$10.00
(e) In violation of Section 63-3-1213, which is the offense of careless driving	$10.00

All assessments collected under this subsection shall be deposited into the State General Fund.

(6) **Other misdemeanors.** In addition to any monetary penalties and

any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any misdemeanor violation not specified in subsection (1), (2) or (3) of this section, except offenses relating to vehicular parking or registration:

FUND	AMOUNT
Crime Victims' Compensation Fund	[Deleted]
State Court Education Fund	[Deleted]
State Prosecutor Education Fund	[Deleted]
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	[Deleted]
Child Support Prosecution Trust Fund	[Deleted]
Law Enforcement Officers Training Fund	[Deleted]
Capital Defense Counsel Fund	[Deleted]
Indigent Appeals Fund	[Deleted]
Capital Post-Conviction Counsel Fund	[Deleted]
Victims of Domestic Violence Fund	[Deleted]
State Crime Stoppers Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	[Deleted]
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	[Deleted]
Crisis Intervention Mental Health Fund	[Deleted]
Intervention Court Fund	[Deleted]
Judicial Performance Fund	[Deleted]
Statewide Victims' Information and Notification System Fund	[Deleted]
Public Defenders Education Fund	[Deleted]
Domestic Violence Training Fund	[Deleted]
Attorney General's Cyber Crime Unit	[Deleted]
Information Exchange Network Fund	[Deleted]
Motorcycle Officer Training Fund	[Deleted]
Civil Legal Assistance Fund	[Deleted]
Justice Court Collections Fund	[Deleted]
Municipal Court Collections Fund	[Deleted]
GENERAL FUND	$121.75

(7) **Other felonies.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any felony violation not specified in subsection (1), (2) or (3) of this section:

FUND	AMOUNT
Crime Victims' Compensation Fund	Deleted]
State Court Education Fund	[Deleted]
State Prosecutor Education Fund	[Deleted]
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	[Deleted]
Child Support Prosecution Trust Fund	[Deleted]
Law Enforcement Officers Training Fund	[Deleted]
Capital Defense Counsel Fund	[Deleted]
Indigent Appeals Fund	[Deleted]
Capital Post-Conviction Counsel Fund	[Deleted]
Victims of Domestic Violence Fund	[Deleted]
Criminal Justice Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	[Deleted]
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	[Deleted]
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	[Deleted]
Crisis Intervention Mental Health Fund	[Deleted]
Intervention Court Fund	[Deleted]
Statewide Victims' Information and Notification System Fund	[Deleted]
Public Defenders Education Fund	[Deleted]
Domestic Violence Training Fund	[Deleted]
Attorney General's Cyber Crime Unit	[Deleted]
Forensics Laboratory DNA Identification System Fund	[Deleted]
GENERAL FUND	$280.50

(8) **Additional assessments on certain violations:**

(a) **Railroad crossing violations.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment in addition to all other state assessments due under this section from each person upon whom a court imposes a fine or other penalty for any violation involving railroad crossings under Section 37-41-55, 63-3-1007, 63-3-1009, 63-3-1011, 63-3-1013 or 77-9-249:

Operation Lifesaver Fund	$25.00

(b) **Drug violations.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment in addition to all other state assessments due under this section from each person upon whom a court imposes a fine or other penalty for any violation of Section 41-29-139:

Drug Evidence Disposition Fund	$25.00
Mississippi Foster Care Fund	$2.00

(c) **Motor vehicle liability insurance violations.** In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment in addition to all other state assessments due under this section from each person upon whom a court imposes a fine or other penalty for any violation of Section 63-15-4(4) or Section 63-16-13(1):

Uninsured Motorist Identification Fund:	
First offense	$200.00
Second offense	$300.00
Third or subsequent offense	$400.00

(9) If a fine or other penalty imposed is suspended, in whole or in part, such suspension shall not affect the state assessment under this section. No state assessment imposed under the provisions of this section may be suspended or reduced by the court.

(10)(a) After a determination by the court of the amount due, it shall be the duty of the clerk of the court to promptly collect all state assessments imposed under the provisions of this section. The state assessments imposed under the provisions of this section may not be paid by personal check.

(b) It shall be the duty of the chancery clerk of each county to deposit all state assessments collected in the circuit, county and justice courts in the county on a monthly basis with the State Treasurer pursuant to appropriate procedures established by the State Auditor. The chancery clerk shall make a monthly lump-sum deposit of the total state assessments collected in the circuit, county and justice courts in the county under this section, and shall report to the Department of Finance and Administration the total number of violations under each subsection for which state assessments were collected in the circuit, county and justice courts in the county during that month.

(c) It shall be the duty of the municipal clerk of each municipality to deposit all the state assessments collected in the municipal court in the municipality on a monthly basis with the State Treasurer pursuant to appropriate procedures established by the State Auditor. The municipal clerk shall make a monthly lump-sum deposit of the total state assessments collected in the municipal court in the municipality under this section, and shall report to the Department of Finance and Administration the total number of violations under each subsection for which state assessments were collected in the municipal court in the municipality during that month.

(11) It shall be the duty of the Department of Finance and Administration to deposit on a monthly basis all state assessments into the State General Fund or proper special fund in the State Treasury. The Department of Finance and Administration shall issue regulations providing for the proper allocation of these funds.

(12) The State Auditor shall establish by regulation procedures for refunds of state assessments, including refunds associated with assessments

imposed before July 1, 1990, and refunds after appeals in which the defendant's conviction is reversed. The Auditor shall provide in the regulations for certification of eligibility for refunds and may require the defendant seeking a refund to submit a verified copy of a court order or abstract by which the defendant is entitled to a refund. All refunds of state assessments shall be made in accordance with the procedures established by the Auditor.

HISTORY: Laws, 1990, ch. 329, § 1; Laws, 1991, ch. 356, § 3; Laws, 1995, ch. 500, § 2; Laws, 1996, ch. 505, § 7; Laws, 1996, ch. 506, § 14; Laws, 1997, ch. 550, § 3; Laws, 1997, ch. 574, § 2; Laws, 1998, ch. 429, § 7; Laws, 2001, ch. 417, § 1; Laws, 2002, ch. 622, § 1; Laws, 2003, ch. 425, § 1; Laws, 2004, ch. 535, § 1; Laws, 2004, ch. 543, § 4; Laws, 2005, ch. 406, § 2; Laws, 2005, ch. 413, § 5; Laws, 2005, 2nd Ex Sess, ch. 1, § 4; Laws, 2006, ch. 581, § 2; Laws, 2007, ch. 332, § 1; Laws, 2007, ch. 559, § 3; Laws, 2007, ch. 578, § 1; Laws, 2008, ch. 549, § 6; Laws, 2009, ch. 433, § 6; Laws, 2009, ch. 535, § 1; Laws, 2010, ch. 495, § 1; Laws, 2011, ch. 531, § 1; reenacted without change, Laws, 2011, ch. 545, § 7; Laws, 2012, ch. 329, § 9; Laws, 2012, ch. 554, § 1; Laws, 2014, ch. 512, § 3; Laws, 2015, ch. 465, § 3; Laws, 2016, ch. 459, § 71; Laws, 2016, ch. 509, § 1, eff from and after July 1, 2016; Laws, 2018, ch. 454, § 3, eff from and after passage (approved April 13, 2018); Laws, 2019, ch. 412, § 2, eff from and after July 1, 2019; Laws, 2019, ch. 466, § 28, eff from and after July 1, 2019.

Joint Legislative Committee Note — Section 1 of ch. 535 Laws of 2004, effective from and after July 1, 2004 (approved May 12, 2004), amended this section. Section 4 of ch. 543, Laws of 2004, effective from and after July 1, 2004 (approved May 13, 2004), also amended this section. As set out above, this section reflects the language of Section 4 of ch. 543, Laws of 2004, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 2 of ch. 406, Laws of 2005, effective July 1, 2005 (approved April 20, 2005), amended this section. Section 5 of ch. 413, Laws of 2005, also amended this section. The amendments made by the two bills were nonconforming and did not meet the criteria for integration by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation. However, the conflict was resolved by passage of Section 4 of ch. 1 of Laws of 2005, 2nd Ex Sess, the text of which is reflected in the section as set out above.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected typographical errors in the amounts of the Total State Assessments as amended by Laws of 2005, 2nd Ex Sess, ch. 1, § 4. The Joint Committee ratified the corrections at its June 29, 2005 meeting.

Section 1 of ch. 1, Laws, 2007, effective July 1, 2007 (approved March 13, 2007), amended this section. Section 3 of ch. 559, Laws of 2007, effective July 1, 2007 (approved April 20, 2007), also amended this section. Section 1 of ch. 578, Laws of 2007, effective July 1, 2007 (approved April 21, 2007), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 578, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 6 of ch. 433, Laws of 2009, effective July 1, 2009 (approved March 23, 2009), amended this section. Section 1 of ch. 535, Laws of 2009, effective from and after July 1, 2009 (approved April 14, 2009), amended this section as amended by Section 6 of ch.

433, Laws of 2009. As set out above, this section reflects the language of Section 1 of ch. 535, Laws of 2009, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 1 of ch. 531, Laws of 2011, effective from and after July 2, 2011 (approved April 26, 2011), amended this section. Section 7 of ch. 545, Laws of 2011, effective July 1, 2011 (approved April 26, 2011), reenacted this section without change. As set out above, this section reflects the language of Section 1 of ch. 531, Laws of 2011, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section effective on an earlier date.

Section 9 of Chapter 329, Laws of 2012, effective July 1, 2012 (approved April 13, 2012), amended this section. Section 1 of Chapter 554, Laws of 2012, effective July 1, 2012 (approved May 22, 2012) also amended this section. As set out above, this section reflects the language of Section 1 of Chapter 554, Laws of 2012, which contains language that specifically provides that it supersedes § 99-19-73 as amended by Chapter 329, Laws of 2012.

Section 1 of Chapter 509, Laws of 2016, effective July 1, 2016, amended this section. Section 71 of Chapter 459, Laws of 2016, effective July 1, 2016, also amended this section. As set out above, this section reflects the language of Section 1 of Chapter 509, Laws of 2016, which contains language that specifically provides that it supersedes § 99-19-73 as amended by Laws of 2016, ch. 459.

Section 2 of Chapter 412, Laws of 2019, effective upon passage (approved March 28, 2019), amended this section. Section 28 of Chapter 466, Laws of 2019, effective July 1, 2019 (approved April 16, 2019), also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision, and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision, and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 12, 2019, meeting of the Committee.

Editor's Notes — Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer whenever they appear. Section 27-104-6 provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

Laws of 2011, ch. 545, § 8, effective July 1, 2011, amended Laws of 2008, ch. 549, § 9, to extend the date of the repealer for this section from July 1, 2011, until July 1, 2014. Subsequently, Laws of 2011, ch. 531, § 2, effective July 2, 2011, repealed Laws of 2008, ch. 549, § 9, to delete the repealer for this section.

Laws of 2012, ch. 329, § 11, provides:

"SECTION 11. Sections 1 and 8 of this act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended (preclearance was received August 24, 2012), or January 1, 2013, whichever occurs later; and the remainder of this act shall take effect and be in force from and after July 1, 2012."

Laws of 2014, ch. 512, § 4 provides:

"SECTION 4. During fiscal year 2015, the following agencies shall have the authority to receive, budget and expend the following amounts generated from the assessments enacted in Section 3 of House Bill No. 579 [Chapter 512], 2014 Regular Session:

"Department of Revenue for the Justice "Court Collections Program	$ 500,000.00
"Department of Revenue for the Municipal "Court Collections Program	$ 500,000.00
"Attorney General's Office for the Motorcycle "Officers Training Program	$ 20,000.00

"The above listed escalations shall be done in accordance with the rules and regulations of the Department of Finance and Administration in a manner consistent with the escalation of federal funds."

Laws of 2016, ch. 459, § 1, codified as Section 27-104-201, provides:

"SECTION 1. This act shall be known and may be cited as the 'Mississippi Budget Transparency and Simplification Act of 2016'."

The Child Support Prosecution Trust Fund, referred to in subsections (1), (2), (6) and (7) above, was renamed the Child Support Prosecution Fund by § 21 of Chapter 7, 2017 1st Extraordinary Session, effective June 23, 2017. See § 43-19-61.

The Vulnerable Persons Training, Investigation and Prosecution Trust Fund, referred to in subsections (1), (2), (3), (6) and (7) above, was renamed the Vulnerable Persons Training, Investigation and Prosecution Fund by § 22 of Chapter 7, 2017 1st Extraordinary Session, effective June 23, 2017. See § 43-47-39.

The Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund, referred to in subsections (1), (2), (3), (6) and (7) above, was renamed the Law Enforcement Officers and Fire Fighters Disability Benefits Fund by § 23 of Chapter 7, 2017 1st Extraordinary Session, effective June 23, 2017. See § 45-2-21.

Laws of 2019, ch. 466, § 1, provides as follows:

"SECTION 1. This act shall be known and may be cited as the 'Criminal Justice Reform Act.' "

Amendment Notes — The first 2019 amendment (ch. 412), in (8)(b), added a state assessment in the amount of $2.00 for the Mississippi Foster Care Fund.

The second 2019 amendment (ch. 466) substituted "Intervention Court Fund" for "Drug Court Fund" in (1) through (3), (6), and (7).

Cross References — Prohibition against one state agency charging another state agency fees, etc., for services or resources received, see § 27-104-35.

Defrayal of expenses of certain state agencies by appropriation of Legislature from General Fund, see § 27-104-37.

Driver Training Penalty Assessment Fund, see § 37-25-17.

State Court Education Fund and State Prosecutor Education Fund, see § 37-26-9.

Emergency Medical Services Operating Fund, see § 41-59-61.

Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

Law Enforcement Officers Training Fund, see § 45-6-15.

Hunter Education and Training Program, see § 49-1-65.

Mississippi Alcohol Safety Education Program Fund and the Federal-State Alcohol Program Fund, see § 63-11-32.

Statewide Litter Prevention Fund, see § 65-1-167.

Disposition of assessments collected under subsection (4) of this section, see § 97-15-29.

Capital Defense Counsel Fund, see § 99-18-17.

Criminal Justice Fund, see § 99-19-32.

Deposit of portion of funds collected pursuant to this section into Criminal Justice Fund, see § 99-19-32.

Statewide Victims' Information and Notification System Fund, see § 99-45-9.

Law enforcement officers and fire fighters death benefits trust fund, see § 45-2-1.

Law enforcement officers and fire fighters disability benefits trust fund, see § 45-2-

21.

Public Defenders Education Fund, see § 99-40-1.

Domestic Violence Training Fund, see § 93-21-31.

OPINIONS OF THE ATTORNEY GENERAL

State assessment would be levied in event only punishment was period of incarceration; indigent defendant would be subject to paying state assessment, and in event defendant was unable to pay fine and assessment immediately, defendant could pay assessment in installments or participate in public work program. Bounds, August 29, 1990, A.G. Op. #90-0619.

Municipal court clerk is required to report all state assessments collected during each month, notwithstanding said defendant may still owe court additional state assessments that may not be collected until several months later; therefore, municipal court clerk would be required to report all state assessments collected during month regardless of whether or not defendant's total fine had been paid into municipal court. Daniel, Oct. 3, 1990, A.G. Op. #90-0691.

Subsection (6) of this section provides for a state assessment to be collected for any felony violation. Such assessment should be collected for each violation. Thus, the assessment should be collected twice if the defendant is convicted of two counts. Pryor, April 12, 1996, A.G. Op. #96-0185.

Based on subsection (7) of this section, the state assessment court costs are collected by the clerk of the court regardless of whether the judge imposes them or not. Evans, June 28, 1996, A.G. Op. #96-0428.

If a judge non-adjudicates a DUI charge under § 63-11-30(3) but imposes a $250.00 fine as a condition of such non-adjudication, such fine is a "penalty" under § 99-19-73 and, therefore, the assessment must be collected. Cruber, Feb. 22, 2002, A.G. Op. #02-0102.

A violation of "no tag", "expired tag", "improper tag", etc. is a violation of § 27-19-131, the operation of a vehicle without the payment of the proper taxes, and the proper state assessment to be levied upon such a conviction is provided for by § 99-19-73(5) – "other misdemeanors." Morgan, Apr. 19, 2002, A.G. Op. #02-0181.

§ 99-19-75. Assessment on certain offenses to be deposited in Mississippi Children's Trust Fund or Victims of Human Trafficking and Commercial Sexual Exploitation Fund.

(1) In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected from each person upon whom a court imposes a fine or other penalty for any violation of Section 97-3-65, 97-5-1 et seq. or 97-3-7, when committed against a minor, an assessment of One Thousand Dollars ($1,000.00) to be deposited into the Mississippi Children's Trust Fund created in Section 93-21-305, using the procedures described in Section 99-19-73.

(2) In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected from each person upon whom a court imposes a fine or other penalty for any violation of Section 97-3-7, 97-3-54.1, 97-3-65, 97-3-95, 97-5-1 et seq., or 97-29-51 an assessment of One Thousand Dollars ($1,000.00) to be deposited into the "Victims of Human Trafficking and Commercial Sexual Exploitation Fund" created in Section 97-3-54.11.

HISTORY: Laws, 2005, ch. 516, § 1, eff from and after July 1, 2005; Laws, 2020, ch. 493, § 5, eff from and after passage (became law without the Governor's signature on July 9, 2020).

Amendment Notes — The 2020 amendment, effective July 9, 2020, in (1), deleted "Mississippi Code of 1972" following "97-3-7," "93-21-305" and "99-19-73"; and added (2).

Cross References — Victims of Human Trafficking and Commercial Sexual Exploitation Fund, see §§ 97-3-54.10 through 97-3-54.13.

OPINIONS OF THE ATTORNEY GENERAL

The assessment required by Section 99-19-75 would not be proper in a situation in which the victim was 18 years old or older. Lawrence, Apr. 14, 2006, A.G. Op. 05-0242.

§ 99-19-77. Assessment against convicted criminal defendants to cover costs of investigations; use of assessments.

In addition to any criminal penalties or fines, the court may impose an assessment against a defendant convicted of a felony violation, or a Class I violation that is punishable as provided in Section 49-7-141, investigated by the Office of the Attorney General, the district attorneys, sheriffs, the Mississippi Bureau of Investigation, Mississippi Bureau of Narcotics, the Mississippi Agricultural and Livestock Theft Bureau, the Mississippi Department of Wildlife, Fisheries and Parks and municipal police departments which may cover all reasonable costs of the investigation. Costs are to be paid to the appropriate governmental entity incurring the particular item of cost and include, but are not limited to, the cost of investigators, service of process, court reporters, expert witnesses and attorney's fees, and transportation costs expended by the governmental entity in the investigation of such case, and must be used to augment the governmental entity's existing budget and not to supplant it.

HISTORY: Laws, 2010, ch. 350, § 1; Laws, 2011, ch. 403, § 1; Laws, 2015, ch. 373, § 1, eff from and after July 1, 2015.

SENTENCING OF HABITUAL CRIMINALS

Sec.
99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.
99-19-83. Sentencing of habitual criminals to life imprisonment.
99-19-84. Electronic monitoring as condition of probation for offense requiring registration as a sex offender; rules and regulations.
99-19-85. Governor's pardoning power unaffected.
99-19-87. Punishment by death unaffected.

§ 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony unless the court provides an explanation in its sentencing order setting forth the cause for deviating from the maximum sentence, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

HISTORY: Laws, 1976, ch. 470, § 1; brought forward without change, Laws, 2014, ch. 457, § 79, eff from and after July 1, 2014; Laws, 2018, ch. 416, § 12, eff from and after July 1, 2018.

Cross References — Admissibility of properly authenticated offender's records cover sheet when offered for the purpose of enhanced sentencing under this section or § 41-29-147 or 99-19-81 or other similar purposes, see § 47-5-10.

Promulgation of rules and regulations concerning earned time allowances for habitual offenders, see § 47-5-138.

Inmate convicted as habitual offender ineligible for earned time allowance on sentence, see § 47-5-139.

Ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

Ineligibility for earned probation program of persons previously convicted of felonies, see § 47-7-47.

Sentencing of habitual criminals to life imprisonment, see § 99-19-83.

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.
2. In general.
3. Sufficiency of prior sentences, generally.
4. —"Charges separately brought."
5. —Separate incidents.
6. Proportionality.
7. Defendant's mistaken belief.
8. Sentencing trial or hearing, generally.
9. —When held.
10. — Disqualification of trial judge.
11. —As constituting double jeopardy.
12. Out of state convictions.
13. Sufficiency of indictment.
14. Amendment of indictment.
15. Sentencing discretion.
16. Proof of prior conviction or sentence.
17. Particular circumstances.
18. Sentence not excessive.
19. Unadjudicated offenses.
20. Habitual offender sentences.

1. Constitutionality.

The record justified the trial court in giving defendant, a habitual offender, 41 years without parole for three counts of armed robbery; the fact that defendant's actuarial life-expectancy was 41.7 years did not render the sentence grossly disproportionate in violation of his constitutional rights. Johnson v. State, 29 So. 3d 738, 2009 Miss. LEXIS 610 (Miss. 2009).

Defendant had no constitutional right to a jury trial on the issue of habitual-offender status. Johnson v. State, 29 So. 3d 738, 2009 Miss. LEXIS 610 (Miss. 2009).

2. In general.

Similar to Miss. Code Ann. § 99-19-81, the violent-habitual-offender statute, Miss. Code Ann. § 99-19-83, includes no language requiring that the underlying felonies must have been committed at or above a certain age. Skinner v. State, 120 So. 3d 419, 2013 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 452 (Miss. 2013).

Statute is satisfied where a defendant was twice previously convicted of separate felonies and a sentence of one or more years was pronounced, regardless of subsequent probation or suspension of sentence. Middleton v. State, 49 So. 3d 161, 2010 Miss. App. LEXIS 635 (Miss. Ct. App. 2010).

Trial court did not err in dismissing an inmate's petition alleging that the Mississippi Department of Corrections improperly computed his discharge date and that he had to be released from prison because the inmate was not entitled to any earned-time credit, and his time had been properly computed; because Miss. Code Ann. § 99-19-81 clearly stated that a habitual offender's sentence would not be reduced, the inmate was required to serve the maximum term of imprisonment for his crime of aggravated assault of a law enforcement officer, which was thirty years' imprisonment, Miss. Code Ann. § 97-3-7(2), and was the sentence that the inmate received. Lee v. Kelly, 34 So. 3d 1203, 2010 Miss. App. LEXIS 75 (Miss. Ct. App. 2010).

Although the inmate claimed that he was surprised by his sentence because his plea petition did not state that he would be sentenced as a habitual offender under Miss. Code Ann. § 99-19-81, the claim of surprise was refuted by the plea hearing transcript; defendant swore under oath that he understood that he was pleading guilty and would be sentenced as a habitual offender. Sneed v. State, 990 So. 2d 226, 2008 Miss. App. LEXIS 136 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Miss. Code Ann. § 99-19-81 is not a violation of double jeopardy as this section fixes the punishment for future felony offenses, and it does not punish or increase the punishment for those past offenses. Denman v. State, 964 So. 2d 620, 2007 Miss. App. LEXIS 604 (Miss. Ct. App. 2007).

Defendant's argument in the trial court was that his plea was not knowingly, intelligently, freely, and voluntary given and that he did not receive effective assistance of counsel; defendant argued for the first time on appeal that his sentence was illegal; as such, defendant was barred from raising the issue before the appellate court. Hargett v. State, 864 So. 2d 283, 2003 Miss. App. LEXIS 665 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 44 (Miss. 2004).

Trial court's failure to hold a separate sentencing hearing before sentencing defendant to life imprisonment without parole following defendant's conviction for armed robbery was harmless because defendant's three prior burglary convictions made the sentence mandatory. Stevens v. State, 840 So. 2d 785, 2003 Miss. App. LEXIS 181 (Miss. Ct. App. 2003).

Defendant's conviction of felony shoplifting and five-year sentence without parole as a habitual offender was affirmed, where the appellate court found no merit in his arguments that the indictment was defective and that the jurors' handwritten verdict was ambiguous; nothing in the language of the shoplifting statute, Miss. Code Ann. § 97-23-93, or in the habitual offender statute, Miss. Code Ann. § 99-19-81, protected conviction for a third felony shoplifting offense from the application of normal maximum sentencing rules. Taylor v. State, 838 So. 2d 339, 2002 Miss. App. LEXIS 512 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. App. LEXIS 175 (Miss. Ct. App. 2003).

This section does not violate a defendant's constitutional rights to due process or equal protection, and does not violate the constitutional requirements pertaining to separation of powers. Magee v. State, 759 So. 2d 464, 2000 Miss. App. LEXIS 106 (Miss. Ct. App. 2000).

A burglary defendant was properly sentenced as a habitual offender under this section based on previous convictions which occurred on the same day and were based on guilty pleas. Griffin v. State, 607 So. 2d 1197, 1992 Miss. LEXIS 603 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, the court's refusal to allow the defendant to inform the jury about his ineligibility for parole as a habitual offender was error even though the court had not yet adjudicated his habitual offender status. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

A second indictment against a defendant, which added that the defendant was charged as a habitual offender, was not an improper amendment without the required action of the grand jury, since the second indictment was not an amendment of the original amendment on motion by the State, but was a second indictment returned by a grand jury. Wilson v. State, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

A defendant waived his right to indictment for grand larceny, and thus his conviction for grand larceny could be used subsequently to sentence the defendant as a habitual offender, where the defendant was originally indicted for the burglary of 2 automobiles, the defendant appeared before the circuit court and testified under oath that he understood that he was charged with burglary of an automobile in each case, that he wished to withdraw his pleas of not guilty and enter pleas of guilty to related charges of grand larceny, that he understood the nature of the offense of grand larceny, and that he in fact committed those crimes. Jefferson v. State, 556 So. 2d 1016, 1989 Miss. LEXIS 485 (Miss. 1989).

The enactment of § 99-19-101, which established the bifurcated procedure in capital cases wherein "the jury shall set the sentence," did not eliminate the necessity of the sentencing procedure under the recidivism statute, this section, and [former] Rule 6.04 of the Uniform Criminal Rules of Circuit Court Practice, when an indictment charges both capital murder and habitual status and a trial is conducted. The statutory language does not indicate that the jury in the guilt/sentencing phases of a bifurcated trial is to decide the issue of recidivism when a defendant is tried as a habitual offender on a charge of capital murder. Hoover v. State, 552 So. 2d 834, 1989 Miss. LEXIS 439 (Miss. 1989).

An accused has no constitutional right to a trial by jury on the question of whether he or she is a habitual offender. All that is required is that the accused be properly indicted as a habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof. Keyes v. State, 549 So. 2d 949, 1989 Miss. LEXIS 437 (Miss. 1989).

The application of this section to recidivist murderers, rapists and kidnappers does not violate the Fourteenth Amendment of the United States Constitution even though under the habitual offender statutes, § 99-19-83 and this section, taken together, only those convicted of murder, rape or kidnapping can be sentenced to life without parole without proof of a prior conviction of a crime of violence. Sutherland v. State, 537 So. 2d 1360, 1989 Miss. LEXIS 23 (Miss. 1989).

In a prosecution for aggravated assault, a rape conviction could be used for enhancement purposes under the habitual offender statute, this section, even though the assault was committed before the conviction of the rape. Haynes v. State, 520 So. 2d 1367, 1988 Miss. LEXIS 165 (Miss. 1988).

While it is not always necessary for the indictment to recite the statute number under which a defendant is being charged, the better practice is to include it, this is especially so in habitual offender cases where the state may proceed under one of 2 statutes. Martin v. State, 501 So. 2d 1124, 1987 Miss. LEXIS 2285 (Miss. 1987).

This section is not unconstitutional as ex post facto law, nor does it constitute equal protection violation. Perkins v. Cabana, 794 F.2d 168, 1986 U.S. App. LEXIS 27510 (5th Cir. Miss.), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366, 1986 U.S. LEXIS 4575 (U.S. 1986).

Reasonable and harmonious construction of §§ 47-5-138, 47-5-139, and 47-7-3 is that legislature intended them to maintain enhanced penalty that this section imposes on habitual offenders, which penalty includes denial of certain privileges available to other prisoners. Perkins v. Cabana, 794 F.2d 168, 1986 U.S. App. LEXIS 27510 (5th Cir. Miss.), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366, 1986 U.S. LEXIS 4575 (U.S. 1986).

A defendant who enters a guilty plea to a felony charge is not entitled, as a constitutional right, to information regarding the future use of his conviction based on the guilty plea for purposes of enhancement. Presley v. State, 498 So. 2d 832, 1986 Miss. LEXIS 2845 (Miss. 1986).

A defendant convicted of a single charge of grand larceny could not successfully complain because he had been charged in a multi-count indictment which in addition to the grand larceny charge also charged him with conspiracy to commit grand larceny, and a further charge that he was a recidivist in that he had previously been convicted of four separate felonies. Perkins v. State, 487 So. 2d 791, 1986 Miss. LEXIS 2389 (Miss. 1986).

An indictment which adequately advised defendant of the specific crimes the state would seek to prove that he had previously been convicted of was also sufficient to advise him that the state was seeking enhanced punishment under this section. Perkins v. State, 487 So. 2d 791, 1986 Miss. LEXIS 2389 (Miss. 1986).

Exercise of prosecutorial discretion in electing, or refusing, to indict criminal defendant under habitual criminal statute (this section) does not constitute encroachment by prosecutor on judicial power to determine appropriate criminal sentence. Washington v. State, 478 So. 2d 1028, 1985 Miss. LEXIS 2277 (Miss. 1985).

Defendant charged with being habitual criminal is not deprived of fair trial because grand jury indicting defendant has been informed of prior convictions; indeed, grand jury of necessity has to be informed of prior convictions before indictment seeking enhanced punishment can be sought by state. Washington v. State, 478 So. 2d 1028, 1985 Miss. LEXIS 2277 (Miss. 1985).

Sentencing convicted defendant to life imprisonment under § 99-19-83 is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7-year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under this section. Smith v. State, 477 So. 2d 191, 1985 Miss. LEXIS 2067 (Miss. 1985).

Defendant sentenced as habitual offender has no entitlement to credit for "good time." Hardy v. State, 473 So. 2d 941, 1985 Miss. LEXIS 2166 (Miss. 1985).

Application of sentencing enhancement statute (this section) to convicted defendant whose prior convictions occurred before January 1, 1977, date this section became effective, does not violate ex post facto clause of United States Constitution. Smith v. State, 465 So. 2d 999, 1985 Miss. LEXIS 1918 (Miss. 1985).

Under this section, the maximum term of imprisonment for rape is that sentence imposed by the trial judge, and sentence must be reasonably less than life. Friday v. State, 462 So. 2d 336, 1985 Miss. LEXIS 1844 (Miss. 1985), overruled in part, Bester v. State, 188 So. 3d 526, 2016 Miss. LEXIS 153 (Miss. 2016), but see McCarty v. State, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

In a prosecution for burglary the trial court properly sentenced defendant pursuant to this section, despite the fact that one prior conviction of defendant was on appeal at the time of sentencing, where the Legislature in enacting this section intended to adopt the interpretation of "conviction" that when a jury and circuit court return a verdict of guilty it is a "conviction" of the crime charged. Jackson v. State, 418 So. 2d 827, 1982 Miss. LEXIS 2129 (Miss. 1982).

The effect of double enhancement where the crime of carrying a concealed weapon after conviction of a felony is combined with sentencing under the habitual offenders statute does not render the latter statute unconstitutional. Failure of the state to specify in an indictment which section of the habitual criminal statute, this section or § 99-19-83, applies to a defendant is not error since the statutes are not criminal offenses and only affect sentencing. Osborne v. State, 404 So. 2d 545, 1981 Miss. LEXIS 2219 (Miss. 1981).

In sentencing a defendant under this section, the trial judge may consider convictions occurring after the date of the principal offense at issue. Yates v. State, 396 So. 2d 629, 1981 Miss. LEXIS 1992 (Miss. 1981).

3. Sufficiency of prior sentences, generally.

Evidence was sufficient to support the trial court's finding that defendant was an habitual offender because the amended indictment charged that defendant had a prior felony conviction in Cobb County, Georgia, for theft by receiving stolen property for which he had been sentenced to serve one year or more; and defendant had a prior felony conviction in Lowndes County, Mississippi, for the unlawful taking of a motor vehicle for which he was sentenced to three years in the custody of the Mississippi Department of Corrections. Perry v. State, 233 So. 3d 750, 2017 Miss. LEXIS 224 (Miss. 2017).

Trial court properly sentenced defendant as a habitual offender because a certified document from Louisiana was sufficient proof of one of defendant's prior convictions and he did not argue that the evidence was insufficient regarding his other prior conviction. Duck v. State, 225 So. 3d 1, 2017 Miss. App. LEXIS 206 (Miss. Ct. App. 2017), cert. denied, — So. 3d —, 2018 Miss. LEXIS 20 (Miss. 2018).

Sufficient evidence was presented to establish defendant's two prior convictions, required to prove that defendant was a habitual offender under Miss. Code Ann. § 99-19-81 (Rev. 2007) as the sentencing orders from the prior crimes were attached to the motion to amend the indictment to reflect that defendant had been convicted of two previous felonies. Arrington v. State, 69 So. 3d 29, 2011 Miss. App. LEXIS 89 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 426 (Miss. 2011).

Trial court did not err in sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-81; the State offered certified documentation of defendant's two prior convictions, the trial court accepted this documentation, and the certified convictions were later introduced into the record as exhibits, and the court found no error in the trial court's acceptance of this documentation as proof of the previous convictions. Davis v. State, 995 So. 2d 767, 2008 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Defendant was not prejudiced by the imposition of a forfeiture of good time based on a meritless motion for post-conviction relief because he was not eligible for such as a habitual offender. Adams v. State, 962 So. 2d 640, 2007 Miss. App. LEXIS 38 (Miss. Ct. App. 2007).

Because one defendant was convicted of two separate felony counts of transfer of a controlled substance and sentenced to a ten-year term for each count and the sentences ran concurrently, which constituted separate terms under Miss. Code Ann. § 99-19-81, defendant was properly sentenced as a habitual offender. Collins v. State, 817 So. 2d 644, 2002 Miss. App. LEXIS 313 (Miss. Ct. App. 2002).

Where a defendant was twice previously judged guilty of distinct felonies on which sentences of one year or more were pronounced, intent was satisfied regarding habitual offender status irrespective of subsequent probation or suspension, statutory. Green v. State, 802 So. 2d 181, 2001 Miss. App. LEXIS 532 (Miss. Ct. App. 2001).

The statute does not require an habitual offender to have actually served sentences of more than one year so long as the sentences themselves were more than one year. Reynolds v. State, 784 So. 2d 929, 2001 Miss. LEXIS 115 (Miss. 2001).

There is no requirement that a prior felony conviction used to enhance a sentence must have been entered before the crime occurred for which sentence is to be pronounced; thus, a defendant's habitual offender status could be based, in part, on a prior conviction which was rendered after the crime at issue, but before the conviction for that crime. Sims v. State, 775 So. 2d 1291, 2000 Miss. App. LEXIS 547 (Miss. Ct. App. 2000).

The statute does not preclude the state's use of 14-year-old conviction in sentencing a defendant as a habitual offender. Sanders v. State, 760 So. 2d 839, 2000 Miss. App. LEXIS 231 (Miss. Ct. App. 2000).

The fact that a defendant had not actually been incarcerated after receiving sentences for one year or more for 2 separate prior felony convictions did not affect the sufficiency of the sentences as evidence of habitual offender status. Hewlett v. State, 607 So. 2d 1097, 1992 Miss. LEXIS 451 (Miss. 1992).

Two prior felony convictions could be used to enhance a defendant's punishment, in spite of his arguments that the law does not recognize "attempted criminal assault" as a crime, and that there was no showing on the faces of the sentencing orders of his prior convictions that he made a "knowing and intelligent" plea of guilty, where the record revealed that prior to the sentencing hearing on the habitual offender indictment, the defendant knowingly and intelligently stipulated that he had been convicted of these crimes and that the convictions were free of constitutional defects. Wilson v. State, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

Three prior burglary convictions conformed to the requirements of the habitual offender statute, even though a combined sentencing and probation order was issued for the 3 convictions and the defendant contended that he believed that this was a single sentence which he had received for all of the offenses and that he did not believe that he had been convicted 3 times, where 2 of the burglaries took place on the same day and the third burglary took place on a different day, the defendant was separately indicted for each of these offenses, he pled guilty to each of the indictments, and he was originally separately sentenced by the court in each case by a separate order, each appearing in a separate file and on separate pages of the minutes of the court. White v. State, 571 So. 2d 956, 1990 Miss. LEXIS 758 (Miss. 1990).

A defendant's prior convictions for burglary and grand larceny of 2 school buildings were sufficiently separate and distinct to qualify the defendant for enhanced sentencing since the 2 buildings were separate schools, even though they were geographically proximate, a common walkway connected the 2 buildings, and the schools shared a common auditorium and cafeteria. Pittman v. State, 570 So. 2d 1205, 1990 Miss. LEXIS 691 (Miss. 1990).

A defendant was properly sentenced as a habitual offender pursuant to this section, even though the habitual offender language of the indictment failed to state the dates of his prior convictions, where all of the information contained in the indictment, and specifically the cause number, afforded the defendant access to the date of judgment. Therefore, the information pertaining to the dates of the judgments was substantially set forth in the indictment and sufficient information was afforded the defendant to inform him of the specific prior convictions upon which the State relied for enhanced punishment to comply with due process. Benson v. State, 551 So. 2d 188, 1989 Miss. LEXIS 361 (Miss. 1989).

A defendant convicted of second-degree arson who had previously been convicted and sentenced to a 5-year term for burglary in 1973, and had also been convicted and sentenced to a 3-year term for motor vehicle larceny in 1981, could be sentenced as an habitual offender, notwithstanding that his burglary sentence had been suspended. Weaver v. State, 497 So. 2d 1089, 1986 Miss. LEXIS 2660 (Miss. 1986).

Petitioner was subject to 7-year sentence for burglary, where the documentation presented for sentencing in the trial court indicated that he had 2 prior convictions-for grand larceny and for business burglary-and had been sentenced to separate terms of one year or more in the state penal institution. Rideout v. State, 496 So. 2d 667, 1986 Miss. LEXIS 2606 (Miss. 1986).

While the defendant has a right to be heard at the bifurcated hearing required under the recidivist statutes, where he takes the stand and admits the prior convictions, which are valid on their face, he will not then be heard to challenge the constitutionality of his prior convictions. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

A defendant was entitled to have his sentence as a habitual offender under Mississippi Code § 99-19-83 vacated, where the state at the trial proved that he had 2 felony convictions, but failed to prove that he had actually served one year or more on such convictions. The state's proof would only have sustained a conviction under Mississippi Code § 99-19-81. Ellis v. State, 485 So. 2d 1062, 1986 Miss. LEXIS 2757 (Miss. 1986).

In a prosecution for burglary, the trial properly sentenced defendant as a habitual offender, despite defendant's contention that the habitual offender statute only applied to those habitual offenders twice convicted of distinct felonies who had served sentences through actual incarceration; the statute is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of subsequent probation or suspension of sentence. Jackson v. State, 381 So. 2d 1040, 1980 Miss. LEXIS 1921 (Miss. 1980).

4. —"Charges separately brought."

Post-conviction relief was denied because a claimant was properly sentenced as a habitual offender under this statute; his argument that the predicate felonies were not separately brought within the meaning of the statute where the offenses were committed on different days and indicted separately was foreclosed by binding case law. The court of appeals could not overrule precedent from the Mississippi Supreme Court on this issue. Moran v. State, 235 So. 3d 101, 2017 Miss. App. LEXIS 142 (Miss. Ct. App. 2017).

Trial court did not err in sentencing defendant as a habitual offender without first conducting a bifurcated sentencing hearing because the jury returned a guilty verdict and then was dismissed from the courtroom, and only after their departure did the trial court proceed to sentence defendant; in the pretrial hearing, defendant stipulated to the validity of the prior convictions and did not contest their admissibility on appeal or the trial court's consideration of them. Ford v. State, 206 So. 3d 486, 2016 Miss. LEXIS 396 (Miss. 2016).

Defendant was convicted in February 1998 of one felony count of possession of a controlled substance and two felony counts of uttering a forgery; although these convictions took place on the same day, they were listed in two separate cause numbers, and as the convictions arose out of separate incidents at different times, they rendered defendant subject to being tried as a habitual offender, and whether the individual actually served time in prison was irrelevant. Davis v. State, 5 So. 3d 435, 2008 Miss. App. LEXIS 366 (Miss. Ct. App. 2008).

Two prior burglary convictions, which were relied upon in sentencing a defendant as a habitual offender, were based upon "charges separately brought," within the meaning of this section even though the 2 Nebraska burglary charges had been presented against him as 2 separate counts of a single information. The mere form of presenting 2 charges as separate counts of a single information or indictment in no way merges those charges except for the limited purpose of judicial economy and procedure. Separation of the charges into separate counts rendered them sufficiently separate to satisfy the mandate of this section that they be "separately brought." Kolb v. State, 568 So. 2d 288, 1990 Miss. LEXIS 600 (Miss. 1990).

5. —Separate incidents.

Trial courts' decision to sentence defendant as an habitual offender was supported by certified exhibits showing that he had pled guilty and was convicted of one prior felony in Texas and had been found guilty of a second felony conviction in Georgia. The State's evidence further demonstrated that the two prior felony convictions had arisen from separate incidences and that defendant had been sentenced to serve at least one year for each conviction in a state or federal penal institution. Harris v. State, — So. 3d —, 2020 Miss. App. LEXIS 499 (Miss. Ct. App. Aug. 25, 2020).

Sentence of defendant as a habitual offender was appropriate because the State of Mississippi presented evidence that defendant previously had served concurrent sentences for four prior drug offenses. Concurrent sentences for different crimes were separate sentences under the habitual offender statute. Martin v. State, 240 So. 3d 1047, 2017 Miss. LEXIS 424 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2592, 201 L. Ed. 2d 307, 2018 U.S. LEXIS 3234 (U.S. 2018).

Defendant's habitual offender sentence did not entitle defendant to post-conviction relief because defendant's prior convictions for crimes occurring on the same day involved sufficiently distinct facts, as (1) the crimes involved two separate pieces of property belonging to two different individuals, (2) defendant's burglary of a business was not necessary to facilitate defendant's subsequent burglary of a vehicle, and (3) defendant's criminal passions could have cooled after committing the first crime, allowing defendant to form a new criminal design to commit the second crime. Crump v. State, 288 So. 3d 364, 2019 Miss. App. LEXIS 360 (Miss. Ct. App. 2019).

Defendant's previous crimes, even though listed in a single indictment, were properly considered as separate crimes for purposes of habitual-offender sentencing because the charges in defendant's indictment were separated into separate and distinct counts; the sales clearly occurred at different times; and defendant served 10 years for each crime. Johnson v. State, 132 So. 3d 616, 2013 Miss. App. LEXIS 859 (Miss. Ct. App. 2013).

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that she should not have been charged as a habitual offender as the sentences for her two previous convictions were served concurrently. The two prior felonies were separate incidents, which occurred at different times, and each carried a sentence of at least one year; the fact that she was only incarcerated for one year while serving her concurrent sentences did not afford her relief from habitual offender status under Miss. Code Ann. § 99-19-81. Williams v. State, 24 So. 3d 360, 2009 Miss. App. LEXIS 940 (Miss. Ct. App. 2009).

Where the record showed that an inmate's two prior felonies, although occurring on the same day, arose out of separate incidents at different times, the inmate was properly sentenced as a habitual offender. Jones v. State, 878 So. 2d 254, 2004 Miss. App. LEXIS 698 (Miss. Ct. App. 2004).

Trial court properly sentenced defendant as a habitual offender where defendant burglarized a dwelling and left with a gun he had just stolen from the home. When pursued by a neighbor, defendant fired the gun into the air, constituting a separate offense of aggravated assault; because the aggravated assault occurred at some point in time later than and at a different location than the burglary, it had nothing to do with the burglary of a dwelling case. Davis v. State, 850 So. 2d 176, 2003 Miss. App. LEXIS 646 (Miss. Ct. App. 2003).

Multiple crimes committed during the course of a series of related events may constitute separate and distinct offenses for purposes of this section. Walls v. State, 1999 Miss. App. LEXIS 248 (Miss. Ct. App. May 4, 1999), op. withdrawn, sub. op., 759 So. 2d 483, 2000 Miss. App. LEXIS 145 (Miss. Ct. App. 2000).

A defendant was properly sentenced to life without parole under the habitual offender statute, this section, for convictions of 2 murders, 1 robbery and 2 kidnappings, even though all of the crimes took place on the same day, where the robbery and kidnappings took place separately following the completion of the murders and the murders and the kidnappings occurred at different times and different places and, therefore, were 2 separate "incidents." Nicolaou v. State, 534 So. 2d 168, 1988 Miss. LEXIS 524 (Miss. 1988).

Concurrent sentences are "separate terms" under statute for sentencing as recidivist, language of statute requiring simply sentencing to separate terms, specifically omitting requirement that they be served separately or at all. Three prior convictions set out in habitual offender portion of indictment, although two occurred on same date and third a few days later, all arose out of separate incidents. All three guilty pleas were entered on same date and resulted in concurrent 7-year sentences. Jackson v. State, 518 So. 2d 1219, 1988 Miss. LEXIS 32 (Miss. 1988).

Circuit court did not err in sentencing defendant as habitual offender, although defendant contended that 2 prior convictions in Memphis, Tennessee, had arisen out of the same incident, where court expressly found that prior convictions had in fact arisen out of separate incidents, one consisting of assault and forceful taking of wallet from victim on September 9, 1967, the other of unlawful possession of stolen credit cards which had arisen from incident which occurred on August 26, 1967. Buckley v. State, 511 So. 2d 1354, 1987 Miss. LEXIS 2646 (Miss. 1987).

A defendant convicted of welfare fraud could be sentenced as a recidivist since her 2 earlier convictions for forgery of 2 separate checks on 2 separate dates constituted separate incidents at different times, notwithstanding that the checks had been purloined from the same person and the same name had been forged on each check. McCullum v. State, 487 So. 2d 1335, 1986 Miss. LEXIS 2457 (Miss. 1986).

Though both of defendant's convictions occurred on the same day, they arose out of separate incidents occurring at different times, and therefore, the trial court correctly sentenced the defendant under this section. Rushing v. State, 461 So. 2d 710, 1984 Miss. LEXIS 2034 (Miss. 1984).

Defendant, who had been twice previously convicted of burglary and sentenced to terms of more than one year for each conviction, was properly sentenced as an habitual criminal pursuant to this section, where, although one of the previous offenses occurred on the same day as the one included in the present case, such previous offense was separately brought and arose out of a separate incident which occurred at a different time of day. Crawley v. State, 423 So. 2d 128, 1982 Miss. LEXIS 2372 (Miss. 1982).

In a prosecution for the kidnap and rape of an 8-year-old female child, the habitual offender statute, this section, was inappropriately applied, where the only previous crimes shown to have been committed by the defendant were crimes which arose out of a single incident. Riddle v. State, 413 So. 2d 737, 1982 Miss. LEXIS 1941 (Miss. 1982).

6. Proportionality.

Because the sentences imposed by the circuit court, a maximum of 10 years without eligibility for parole, fell within the applicable statutory sentencing limits, there was no inference of gross disproportionality. Harris v. State, — So. 3d —, 2020 Miss. App. LEXIS 499 (Miss. Ct. App. Aug. 25, 2020).

Imposition of a five-year sentence after appellant was convicted of felony shoplifting, Miss. Code Ann. § 97-23-93(1), was not disproportionate because appellant had two prior felony convictions, establishing his status as a habitual offender, Miss. Code Ann. § 99-19-81, two prior shoplifting convictions, establishing his status as a third shoplifting offender, and the five-year sentence was within the maximum term allowed by § 97-23-93(6). Newson v. State, 107 So. 3d 1079, 2013 Miss. App. LEXIS 70 (Miss. Ct. App. 2013).

Circuit court's sentences did not meet the requirements of Miss. Code Ann. § 99-19-81 because although the circuit court could have been concerned that there was significant disparity between a co-defendant's sentence to drug court and the maximum sentences for the two charges for which defendant had been convicted, it made no other proportionality analysis and no finding that following the mandate of § 99-19-81 violated the constitutional prohibition against cruel and unusual punishment; however, because the State did not file a cross-appeal attacking the legality of defendant's sentences, the court of appeals had no authority to modify the sentences so that they reflected the appropriate maximum sentences as required by the Mississippi Legislature, which had removed all discretion regarding the duration of a sentence that a habitual offender could receive. Bond v. State, 42 So. 3d 587, 2010 Miss. App. LEXIS 94 (Miss. Ct. App.), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 455 (Miss. 2010).

In a carjacking case, a trial court erred by imposing a 30-year sentence, even though defendant was a habitual offender, because this was in excess of the maximum sentence of 15 years for that crime. Perryman v. State, 16 So. 3d 41, 2009 Miss. App. LEXIS 145 (Miss. Ct. App.), cert. denied, 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Defendant's sentence after he was convicted of the possession of cocaine, more then 10 grams, but less than 30 grams, was proper because, although his sentenced might have seemed harsh in light of sentences received by others convicted of drug possession, his sentence fit within the statutory maximum and harsher sentences had been upheld for drug possession. Williams v. State, 5 So. 3d 496, 2008 Miss. App. LEXIS 639 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 135 (Miss. 2009).

Where appellant entered a guilty plea to conspiracy to commit capital murder as a habitual offender under Miss. Code Ann. § 99-19-81, the trial court did not err by sentencing him to twenty years in the

Mississippi Department of Corrections. The trial court properly conducted a proportionality analysis under Solem. Payne v. State, 977 So. 2d 1238, 2008 Miss. App. LEXIS 174 (Miss. Ct. App. 2008).

Although defendant's sixty-year sentence for possession of marijuana was harsh, in light of his prior felony controlled substance violations and the fact that he was an habitual offender for possession and delivery of marijuana, the sentence was proper. Tate v. State, 946 So. 2d 376, 2006 Miss. App. LEXIS 246 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 66 (Miss. 2007).

Defendant was sentenced as a habitual offender under Miss. Code Ann. § 99-19-81; although the trial judge was statutorily required to sentence defendant to a maximum of twenty years as a result of his habitual offender status, the judge deviated from the maximum statutorily mandated penalty and sentenced defendant to fifteen years instead; as a result, the facts did not lend themselves to a finding that defendant received a sentence disproportionate to his crime. Schankin v. State, 910 So. 2d 1113, 2005 Miss. App. LEXIS 169 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 566 (Miss. 2005).

Defendant's 23-year sentence for aggravated assault and possession of a firearm by a felon did not constitute cruel and unusual punishment based on the gravity of the offense, the harshness of the penalty under the habitual offender statute, Miss. Code Ann. § 99-19-81, and the sentences imposed in Mississippi and other jurisdictions for similar crimes. Everett v. State, 835 So. 2d 118, 2003 Miss. App. LEXIS 4 (Miss. Ct. App. 2003).

A trial court judge has the discretion to sentence a defendant found to be an habitual offender to less than the maximum sentence required by this section if the Eighth Amendment proportionality test requires it. To ensure proper proportionality analysis, the trial judge must first conduct a threshold comparison of the crime committed to the sentence to be imposed in order to determine whether an inference of gross disproportionality arises. Pool v. State, 724 So. 2d 1044, 1998 Miss. App. LEXIS 1040 (Miss. Ct. App. 1998).

The sentencing of a defendant under this section, the habitual offender statute, to the 20-year maximum term for aggravated assault as set forth in § 97-3-7(2) was not disproportionate to the crime charged and did not violate the Eighth Amendment where the defendant was convicted of severely bludgeoning the victim with an iron pipe; the statutory maximum penalty for aggravated assault is not grossly out of line with the maximum terms allowed for the commission of other violent crimes in Mississippi, and the maximum penalties imposed for aggravated assault in neighboring states are not profoundly different from those in Mississippi. Fleming v. State, 604 So. 2d 280, 1992 Miss. LEXIS 382 (Miss. 1992).

Sentencing defendant to 15 years without possibility of parole, the maximum penalty for forgery, upon conviction for uttering a $35 forged check, was not unconstitutionally disproportionate in violation of Federal Constitution's Eighth Amendment's cruel and unusual punishment clause, where sentence was imposed under habitual offender statute and defendant's 2 prior burglary convictions were not "truly non-violent" offenses; court noted that defendant's sentence was for 15 years, not life. Burt v. Puckett, 933 F.2d 350, 1991 U.S. App. LEXIS 12195 (5th Cir. Miss. 1991).

A 15-year sentence without hope of parole, imposed upon a defendant as a habitual offender, for uttering a forged check in the amount of $500, did not constitute cruel and unusual punishment. Barnwell v. State, 567 So. 2d 215, 1990 Miss. LEXIS 467 (Miss. 1990).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding this section, which requires habitual offenders to be sentenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. Clowers v. State, 522 So. 2d 762, 1988 Miss. LEXIS 94 (Miss. 1988), limited, Barnwell v. State, 1997 Miss. LEXIS 495 (Miss. Oct. 9, 1997), limited, Espinoza v. State, 1998

Miss. App. LEXIS 618 (Miss. Ct. App. July 28, 1998).

Sentence to 20 years' imprisonment without reduction, revocation or parole imposed upon defendant convicted of arson and of being habitual criminal is not unconstitutionally excessive where arson conviction is based upon defendant's having set occupied house on fire at both front and back doors and where defendant has prior convictions for burglary and uttering forgery. Jenkins v. State, 483 So. 2d 1330, 1986 Miss. LEXIS 2395 (Miss. 1986).

Defendant was not deprived of his opportunity to be heard on the issue of prior convictions, where he had stipulated that he had been twice convicted of assault and the trial court based its enhanced sentence both on that stipulation and on certified copies of defendant's prior felony convictions; moreover, this section is not unconstitutional and a sentence of ten years for arson where the defendant had prior felony convictions for aggravated assault and assault with intent to commit murder did not violate the Eighth Amendment prohibition against cruel and unusual punishment. King v. State, 451 So. 2d 765, 1984 Miss. LEXIS 1761 (Miss. 1984).

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637, 1983 U.S. LEXIS 93 (U.S. 1983) (superseded by statute as stated in Re Petition of Lauer (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habitual offenders convicted under § 97-3-95 could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. Davis v. State, 510 So. 2d 794, 1987 Miss. LEXIS 2637 (Miss. 1987).

7. Defendant's mistaken belief.

Trial court erred by denying the inmate's PCR petition because the inmate was misinformed that he could be sentenced to as little as one year in prison when he pled guilty as a habitual offender under Miss. Code Ann. § 99-19-81, which required that the inmate be sentenced to a mandatory 10 years in prison, and thus, his guilty plea was not voluntarily and intelligently entered. Wrenn v. State, 207 So. 3d 1252, 2017 Miss. App. LEXIS 18 (Miss. Ct. App. 2017).

Trial court was not required by Miss. Unif. Cir. & Cty. R. 9.06 to sua sponte conduct a competency hearing to determine whether defendant was capable of providing a knowing and intelligent waiver of his right to counsel. Whatever may have been defendant's initial understanding of the application of Miss. Code Ann. § 99-19-81, the enhanced sentencing statute, defendant was able to understand what was communicated to him by the court regarding how it applied to him. Hairston v. State, 4 So. 3d 403, 2009 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. dismissed, 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

Defendant's motion for post-conviction relief was properly denied where he had no entitlement to a jury trial on the issue of whether or not he qualified for enhanced punishment under the habitual offender statute; defendant failed to prove that an intervening decision of the U.S. Supreme Court or the Mississippi Supreme Court excepted the procedural time bar of his claim pursuant to Miss. Code Ann. § 99-39-5(2). Smith v. State, 963 So. 2d 1168, 2007 Miss. App. LEXIS 39 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 499 (Miss. 2007).

Defendant's guilty pleas were not "voluntarily" given and, thus, both pleas and defendant's sentence would be vacated; although defendant, as habitual and subsequent offender, was familiar with criminal justice system, and he was advised by sources other than trial court that he was waiving right to jury trial, right to confront and cross-examine witnesses, and right against self-incrimination, no one, either in open court or in chambers, advised defendant that he could be sentenced to no less than 30-year mandatory sentence without parole, and there was justifiable basis for defendant to believe that, if he cooperated with narcotics task force by working as undercover informant, he could receive sentence of less than statutory minimum. Courtney v. State, 704 So. 2d 1352, 1997 Miss. App. LEXIS 600 (Miss. Ct. App. 1997).

A circuit court's summary denial and dismissal of a defendant's motion for post-conviction collateral relief, under §§ 99-39-1 et seq., was not error where the defendant asserted that he entered a guilty plea under the advice and belief that the maximum sentence which could be imposed under the indictment was 20 years so that his 30-year sentence was improper, the maximum sentence which could be imposed under the indictment, which charged the defendant with possession of more than one kilogram of marijuana with intent to distribute and recidivism, was 30 years without parole or probation, and the transcript of the plea colloquy between the trial court judge and the defendant belied the defendant's claim of a 20-year plea bargain. Turner v. State, 590 So. 2d 871, 1991 Miss. LEXIS 875 (Miss. 1991).

An appellant who had entered a guilty plea to an escape charge almost 2 years before this section became effective, whose conviction for escape based on the guilty plea, together with a 1974 robbery conviction, was used to enhance his sentence upon conviction of armed robbery in 1982, was not entitled to withdraw his guilty plea to the escape charge on the ground that, at the time of entering the guilty plea, he had not been informed by counsel or the court that his conviction, based on the guilty plea, could subsequently be used to enhance his punishment for future convictions. Presley v. State, 498 So. 2d 832, 1986 Miss. LEXIS 2845 (Miss. 1986).

A defendant who enters a guilty plea to a felony charge, is not entitled as a matter of constitutional right, to information regarding the future use of his conviction based on the guilty plea for purposes of enhancement of punishment; it is not a consequence of his plea which he must be informed. Presley v. State, 498 So. 2d 832, 1986 Miss. LEXIS 2845 (Miss. 1986).

8. Sentencing trial or hearing, generally.

When habitual offender status is alleged and the accused goes to trial, the trial court must hold a separate hearing without a jury to determine whether habitual offender status should be imposed. Nathan v. State, 552 So. 2d 99, 1989 Miss. LEXIS 470 (Miss. 1989).

A defendant who enters a plea of guilty is not entitled to a hearing separate from the guilty plea hearing on the question of whether he or she should be sentenced as a habitual offender. Keyes v. State, 549 So. 2d 949, 1989 Miss. LEXIS 437 (Miss. 1989).

Full hearing is not required on habitual offender charge if trial court had no discretion in sentencing. Monroe v. State, 515 So. 2d 860, 1987 Miss. LEXIS 2764 (Miss. 1987).

Habitual offender phase of trial was so infirm that it could not survive review where no two-phase trial actually occurred, because state did not reintroduce documents to prove prior convictions in sentencing phase of trial, the trial judge simply relying on it without its introduction. Young v. State, 507 So. 2d 48, 1987 Miss. LEXIS 2442 (Miss. 1987).

At the bifurcated hearing required under the recidivist statutes, the state must prove, beyond a reasonable doubt, that the defendant meets the requirements for sentencing as a habitual offender. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

Circuit judge's inadvertent, offhand comment that he would continue recidivism hearing but that it "will have to be done this court term though" did not limit the judge's authority and preclude him from holding recidivism sentencing hearing while the court was in vacation, and while the judge was sitting in another county. Miller v. State, 492 So. 2d 978, 1986 Miss. LEXIS 2550 (Miss. 1986).

In sentencing phase of capital murder case in which defendant has also been charged as habitual offender, trial judge properly prohibits defense counsel from presenting testimony speculatively as to whether defendant could be sentenced, as recidivist, to life without parole. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

The requirement of this section of a bifurcated trial in prosecutions under that statute means a full two-phase trial prior to any finding that defendant is an habitual offender and subject to enhanced punishment; moreover, a complete record of the second part of the trial must be made. Seely v. State, 451 So. 2d 213, 1984 Miss. LEXIS 1763 (Miss. 1984).

In a prosecution for aggravated assault the court properly refused to allow defendant a jury trial at the sentencing phase as an habitual criminal. Hurt v. State, 420 So. 2d 560, 1982 Miss. LEXIS 2230 (Miss. 1982).

All cases tried involving this section are to be tried pursuant to [former] Rule 6.04 of the Mississippi Uniform Criminal Rules of Circuit Court Practice (1972); a defendant is not entitled to a jury trial on the issue of whether or not he is a habitual offender. The habitual offenders statute does not constitute cruel and inhuman treatment nor is the remoteness of the convictions relied upon for enhanced punishment to be considered as a factor. Adams v. State, 410 So. 2d 1332, 1982 Miss. LEXIS 1888 (Miss. 1982).

9. —When held.

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

10. — Disqualification of trial judge.

Fact that the trial judge was once a prosecutor and who, as prosecutor, signed an indictment in a case which resulted in a felony conviction later used for defendant's habitual-offender sentencing, did not disqualify the trial judge from presiding over the habitual-offender sentencing hearing. Luster v. State, 133 So. 3d 849, 2013 Miss. App. LEXIS 460 (Miss. Ct. App. 2013), cert. denied, 133 So. 3d 818, 2014 Miss. LEXIS 153 (Miss. 2014).

11. —As constituting double jeopardy.

Having failed to prove at trial that defendant was a habitual offender, the State could not attempt to prove his habitual-offender status on remand, as that would violate the prohibition against double jeopardy set forth in Miss. Const. art. III, § 22. Grayer v. State, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), op. withdrawn, sub. op., 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. Hoover v. State, 552 So. 2d 834, 1989 Miss. LEXIS 439 (Miss. 1989).

A habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy for the purpose of the constitutional right against double jeopardy. Ellis v. State, 520 So. 2d 495, 1988 Miss. LEXIS 153 (Miss. 1988).

Neither this section nor § 99-19-83 violates constitutional prohibition against double jeopardy. Perkins v. Cabana, 794 F.2d 168, 1986 U.S. App. LEXIS 27510 (5th Cir. Miss.), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366, 1986 U.S. LEXIS 4575 (U.S. 1986).

Const. Art. 3 § 22, the Double Jeopardy Clause, precluded the state from having a second chance to establish defendant's habitual offender status under this section, where no evidence had been admitted to support such a conviction apart from evidence erroneously admitted by the trial court. De Bussi v. State, 453 So. 2d 1030, 1984 Miss. LEXIS 1826 (Miss. 1984).

12. Out of state convictions.

Denial of appellant's, an inmate's, motion for postconviction relief was inappropriate because he was erroneously sentenced as a habitual offender under Miss. Code Ann. § 99-19-81. His two 1993 Georgia convictions, burglary and theft by taking, arose from the same incident and, as such, they could not alone have supported his habitual-offender status. Bergeron v. State, 60 So. 3d 212, 2011 Miss. App. LEXIS 219 (Miss. Ct. App. 2011).

Evidence of prior convictions in another state met the requirements of this section, even though the evidence contained references to a defendant with different middle initials, where the Department of Corrections serial number and the date of birth was the same throughout the records. Handley v. State, 574 So. 2d 671, 1990 Miss. LEXIS 857 (Miss. 1990), op. withdrawn, sub. op., 1991 Miss. LEXIS 235 (Miss. Apr. 16, 1991).

Circuit court did not err in sentencing defendant as habitual offender, although defendant contended that 2 prior convictions in Memphis, Tennessee, had arisen out of the same incident, where court expressly found that prior convictions had in fact arisen out of separate incidents, one consisting of assault and forceful taking of wallet from victim on September 9, 1967, the other of unlawful possession of stolen credit cards which had arisen from incident which occurred on August 26, 1967. Buckley v. State, 511 So. 2d 1354, 1987 Miss. LEXIS 2646 (Miss. 1987).

Trial court did not err in sentencing defendant as habitual offender based, in part, on 2 previous felony convictions in Iowa, where those prior guilty pleas sufficiently showed on their face that defendant entered pleas knowingly and voluntarily, despite contention of defendant that there was nothing on face of either Iowa conviction indicating that he understood nature and consequences of his guilty pleas. Moore v. State, 508 So. 2d 666, 1987 Miss. LEXIS 2589 (Miss. 1987).

In a prosecution for burglary the trial court properly considered a prior Kentucky conviction of escape from a Kentucky penitentiary as basis for enhancement of punishment pursuant to the habitual offender statute this section, where on its face the record of conviction indicated that defendant's plea of guilty therefor was voluntarily and knowingly made. Phillips v. State, 421 So. 2d 476, 1982 Miss. LEXIS 2254 (Miss. 1982).

13. Sufficiency of indictment.

Defendant had notice of the habitual-offender charge and the basis of the charge because the indictment clearly indcluded both of his prior convictions. Clayton v. State, 271 So. 3d 672, 2018 Miss. App. LEXIS 592 (Miss. Ct. App. 2018).

Circuit court properly denied petitioner's claim for postconviction relief on the basis that the indictment failed to charge him as a habitual offender, as petitioner's knowing and voluntary plea of guilty to felony flight as a Miss. Code Ann. § 99-19-81 habitual offender waived the indictment's failure to include habitual offender status. Joiner v. State, 61 So. 3d 156, 2011 Miss. LEXIS 262 (Miss. 2011).

State's evidence supported defendant's charge as a habitual offender under Miss. Code Ann. § 99-19-83 because both of his previous felonies were for manslaughter and aggravated assault, which were crimes of violence; the State charged defendant as a habitual offender under § 99-19-83, and Miss. Code Ann. § 99-19-81 was clearly listed as an alternative. Johnson v. State, 50 So. 3d 335, 2010 Miss. App. LEXIS 274 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011).

Indictment properly charged defendant as a habitual offender under Miss. Code Ann. § 99-19-81 as it specifically alleged two prior convictions, including where they occurred, the cause numbers, the crimes committed, the conviction dates, and the sentences. Not only did the indictment sufficiently charge defendant as a habitual offender but defendant admitted previous conviction thereby satisfying Miss. Unif. Cir. & Cty. R. 11.03(1). Evans v. State, 988 So. 2d 404, 2008 Miss. App. LEXIS 415 (Miss. Ct. App. 2008).

14. Amendment of indictment.

Defendant's habitual-offender indictment was proper because (1) the record did not support defendant's claim that defendant was first indicted for a parole-eligible offense and the indictment was then amended to charge a parole-ineligible offense, and, (2) in any event, the prosecutor was expressly permitted to amend the indictment. Moffite v. State, — So. 3d —, 2019 Miss. App. LEXIS 581 (Miss. Ct. App. Dec. 3, 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 423 (Miss. 2020).

Defendant's claim of unfair surprise was not only without merit but also procedurally barred because at the hearing on the State's motion to amend the indictment to charge defendant as a habitual offender, defendant's attorney specifically stated that there was no opposition to the State's motion. Nations v. State, 199 So. 3d 1265, 2016 Miss. App. LEXIS 538 (Miss. Ct. App. 2016).

Trial court did not err in allowing the State to amend the indictment to charge defendant as a habitual offender because the State, which moved to amend the indictment four months before trial, provided defendant with ample notice of its intent to charge her as a habitual offender, and she had a fair opportunity to present any defense to that charge. Nations v. State, 199 So. 3d 1265, 2016 Miss. App. LEXIS 538 (Miss. Ct. App. 2016).

It was not error to permit the amendment of defendant's indictment two days before trial to allege defendant's habitual offender status because (1) the motion provided details of defendant's two prior felony convictions and sentences, so defendant was not unfairly surprised, (2) nothing supported defendant's claim that one of the convictions had been expunged, and, (3) had the conviction been expunged, the conviction could still be used to find defendant's habitual offender status. Rushing v. State, 195 So. 3d 760, 2016 Miss. LEXIS 279 (Miss. 2016).

There was no error in allowing the amendment of an indictment to charge defendant as a habitual offender. The defense raised no objection to the State's amendment or the trial court's ruling; moreover, defendant received notice of the motion to amend and of the underlying convictions in advance of his set trial date. Carroll v. State, 196 So. 3d 1054, 2016 Miss. App. LEXIS 17 (Miss. Ct. App.), cert. denied, 202 So. 3d 614, 2016 Miss. LEXIS 326 (Miss. 2016).

Stand-in attorney's failure to object to the amendement of the indictment did not prejudice appellant's case because appellant reached a plea agreement with the State, whereby the State would charge him as a habitual offender. Sellers v. State, 167 So. 3d 268, 2015 Miss. App. LEXIS 315 (Miss. Ct. App. 2015).

Trial court did not err in amending defendant's indictment to charge him as an habitual offender because his prior grand-larceny convictions qualified as separate incidents at different times, which resulted in charges separately brought; defendant had been charged in two separate indictments for stealing four-wheelers from two different persons in different locations, for which he was prosecuted and convicted. Cook v. State, 161 So. 3d 1057, 2015 Miss. LEXIS 192 (Miss. 2015).

Trial court properly denied defendant's post-trial motions because his attorney complied with the requirements for frivolous appeals, and the trial court did not err in allowing the State to amend the indictment to properly reflect defendant's habitual-offender status where the amendment was of form rather than substance and only affected the sentence and not the underlying offenses for which defendant was tried. Swilley v. State, 160 So. 3d 719, 2015 Miss. App. LEXIS 117 (Miss. Ct. App. 2015).

Post-conviction relief was not warranted because there was no error in granting the State's motion to amend an indictment to sentence the applicant as a habitual offender since the applicant did not prove that he was unfairly surprised by the amendment or that he was denied an opportunity to present a defense. The record showed that a copy of the motion to amend was received on April 29, 2010, and it was presented to the trial court on May 12, 2010. Hensley v. State, 156 So. 3d 346, 2014 Miss. App. LEXIS 378 (Miss. Ct. App. 2014), cert. denied, 154 So. 3d 33, 2015 Miss. LEXIS 59 (Miss. 2015).

Circuit court did not err in granting the State's motion to amend the indictment to charge defendant as a recidivist because defendant was provided adequate notice in advance of trial that, upon conviction, the State intended to seek enhanced punishment; the State's motion specifically provided the details of the prior convictions that would be presented to the trial court for sentence enhancement. Williams v. State, 131 So. 3d 1174, 2014 Miss. LEXIS 102 (Miss. 2014).

Trial court did not err in amending the indictment after jury selection had been completed to charge defendant as a habitual offender as the amendment was permitted and as defendant was not unfairly surprised. Ferguson v. State, 136 So. 3d 438, 2013 Miss. App. LEXIS 423 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 136 So. 3d 421, 2014 Miss. LEXIS 210 (Miss. 2014).

Trial court did not err by allowing an amendment to the indictment on the first day of the trial under Miss. Unif. Cir. & Cty. R. 7.09 to charge defendant as a habitual offender under Miss. Code Ann. § 99-19-81 because defendant could not have been unfairly surprised by the amendment since the motion was filed five days before the trial; it was not necessary to prepare a defense based on the amendment because it did not affect the crimes for which defendant was charged since his habitual-offender status only affected his potential sentence. Rice v. State, 172 So. 3d 768, 2013 Miss. App. LEXIS 11 (Miss. Ct. App. 2013).

Because the prosecution filed two motions to amend appellant's indictment to reflect his status as a habitual offender a few months before he was sentenced, appellant was not unfairly surprised by the amendment to charge him as a habitual offender and any defense he wished to raise concerning the amendment of his indictment could have been prepared in the interval between the first motion and the sentencing hearing. Spencer v. State, 994 So. 2d 878, 2008 Miss. App. LEXIS 668 (Miss. Ct. App. 2008).

There was no merit to appellant's argument that an indictment was improperly amended and that he was never formally indicted as an habitual offender under Miss. Code Ann. § 99-19-81 because there was no evidence of surprise, under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, because (1) a trial court entered an order amending the indictment to charge appellant as an habitual offender under Miss. Code Ann. § 99-19-83; (2) at the sentencing hearing, appellee State agreed to reduce § 99-19-83 habitual to Miss. Code Ann. § 99-19-81 habitual; and (3) appellant had been notified of the motion to amend the indictment early in the proceedings against him to charge him as a Miss. Code Ann. § 99-19-83 habitual offender. Sowell v. State, 970 So. 2d 752, 2007 Miss. App. LEXIS 820 (Miss. Ct. App. 2007).

Amendment of an indictment to charge a defendant as a habitual offender under Miss. Code Ann. § 99-19-81, rather than Miss. Code Ann. § 99-19-83 (which would have imposed a greater sentence), was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Smith v. State, 965 So. 2d 732, 2007 Miss. App. LEXIS 579 (Miss. Ct. App. 2007).

Amendment to indictment in order to sentence defendant as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81, was proper where, at trial, defendant did not contest or dispute the prior felony sentences introduced by the State at the hearing to amend the indictment. Torrey v. State, 891 So. 2d 188, 2004 Miss. LEXIS 1375 (Miss. 2004), overruled in part, Gowdy v. State, 56 So. 3d 540, 2010 Miss. LEXIS 656 (Miss. 2010).

State was permitted to amend its indictment charging defendant convicted of capital murder as a habitual offender despite the fact that the two previous felonies were not adjudicated at the time he was convicted of the third felony. It was clear that defendant committed two felonies before he was convicted of the capital murder; to find otherwise would go against the legislative intent of Miss. Code Ann. § 99-19-81. Willie v. State, 876 So. 2d 278, 2004 Miss. LEXIS 473 (Miss. 2004).

When the State attempted to amend the indictment to allege that defendant was an habitual offender, defendant contended that this violated his constitutional right to be charged through an indictment by a grand jury; however, the State formally abandoned its motion to amend the indictment, and therefore, defendant was not subjected to enhanced punishment based on his prior criminal record. Also, the amendment to the indictment to allege the defendant's status as an habitual offender subject to enhanced punishment was not a substantive amendment requiring grand jury action, but could be allowed by the trial court on proper motion by the prosecution. Owens v. State, 869 So. 2d 1047, 2004 Miss. App. LEXIS 14 (Miss. Ct. App. 2004).

Defendant did not err in allowing the State to amend an indictment charging defendant with murder to add an allegation that defendant was a habitual criminal; defendant was on notice of the State's intention to add habitual charges upon receipt of the needed documentation and the amendment neither surprised defendant nor prejudiced his defense. Smith v. State, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

An amendment of an indictment which charged the defendant as a habitual offender under this section rather than § 99-19-83, which imposes a greater sentence than does this section, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Nathan v. State, 552 So. 2d 99, 1989 Miss. LEXIS 470 (Miss. 1989).

Indictment charging defendant as habitual criminal under this section may be amended on date of trial, over objection of defendant, to charge indictment under § 99-19-83 where defense counsel has previously been advised that state intends to proceed under § 99-19-83 and defendant is fully aware during plea negotiations that state is taking this position; if defendant does not ask for continuance on basis of amendment, defendant may not later object on basis of surprise and prejudice in defense. Ellis v. State, 469 So. 2d 1256, 1985 Miss. LEXIS 2100 (Miss. 1985).

15. Sentencing discretion.

Under Miss. Code Ann. § 99-13-7, if the jury had acquitted defendant on both counts and had found him not to have been restored to reason, but had not found that he was a danger to the community, commitment under that statute would not have been mandatory. Despite the unusual circumstances of the sentencing order, the trial court properly exercised its discretion in requiring defendant to first to serve his mandatory life sentence under Miss. Code Ann. § 99-19-81 before his term of an indefinite confinement in a mental institution. Sanders v. State, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant's sentence after being convicted for possession of 73.7 grams of marijuana with intent to distribute as a habitual offender was proper pursuant to Miss. Code Ann. §§ 41-29-142(1) and 99-19-81 where the circuit court was required by statute to sentence him to 40 years' imprisonment without the possibility of parole and/or a $60,000 fine, which is exactly what the circuit court did. Foster v. State, 928 So. 2d 873, 2005 Miss. App. LEXIS 733 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 309 (Miss. 2006).

Reference to both Miss. Code Ann. §§ 99-19-81 and 41-29-147 in the indictment was sufficient to give defendant notice that he could be sentenced under either and gave him a fair opportunity to present a defense. It is not for the defendant to choose between two available sentencing options, both of which have been included in the charges against him. Henderson v. State, 878 So. 2d 246, 2004 Miss. App. LEXIS 657 (Miss. Ct. App. 2004).

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper under Miss. Code Ann. §§ 41-29-147 and 99-19-81 where the trial court's opening remarks on voir dire did not constitute reversible error and defendant did not object at trial; further, defendant failed to establish ineffective assistance of counsel; counsel negotiated a plea that defendant refused and succeeded in having the trial court dismiss the portion of the indictment dealing with the sale occurring within 1,500 feet of a public park. Easter v. State, 878 So. 2d 10, 2004 Miss. LEXIS 484 (Miss. 2004).

At sentencing, once the trial judge had determined that at least two of defendant's prior felony convictions satisfied the requirements of Miss. Code Ann. § 99-19-81, the trial judge had no discretion in imposing the maximum 15-year term of imprisonment without eligibility for parole or probation for defendant's conviction for uttering a false check to a store. Brown v. State, 829 So. 2d 93, 2002 Miss. LEXIS 310 (Miss. 2002).

Sentencing under this section is not discretionary. If a defendant is a repeating offender falling within the provisions of this section, the trial judge has no alternative but to sentence the defendant under that statute. Harris v. State, 527 So. 2d 647, 1988 Miss. LEXIS 255 (Miss. 1988); Courtney v. State, 704 So. 2d 1352, 1997 Miss. App. LEXIS 600 (Miss. Ct. App. 1997).

The fact that a trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Thus, notwithstanding this section, which requires habitual offenders to be sentenced to a maximum term, the trial court had authority, as a function of the Supremacy Clause, to review a particular sentence in light of constitutional principles of proportionality. Clowers v. State, 522 So. 2d 762, 1988 Miss. LEXIS 94 (Miss. 1988), limited, Barnwell v. State, 1997 Miss. LEXIS 495 (Miss. Oct. 9, 1997), limited, Espinoza v. State, 1998 Miss. App. LEXIS 618 (Miss. Ct. App. July 28, 1998).

Full hearing is not required on habitual offender charge if trial court had no discretion in sentencing. Monroe v. State, 515 So. 2d 860, 1987 Miss. LEXIS 2764 (Miss. 1987).

16. Proof of prior conviction or sentence.

Trial court properly denied appellant's motion for post-conviction collateral relief because because his sentence was in not illegal due to the introduction of certified copies of his prior felony convictions; the certification of the documents indicated that the custodian of the records swore that the documents were true and correct copies, not that appellant actually committed any act, and thus, he was not deprived of his right to confrontation. Turner v. State, 262 So. 3d 547, 2018 Miss. App. LEXIS 223 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 41 (Miss. 2019).

State of Mississippi proved defendant's habitual offender status beyond a reasonable doubt by presenting Oklahoma Department of Corrections website data and defendant's pre-sentencing report. Although the social security number and birth dates differed, there was a photo and conviction data on the website, and defendant admitted to the offenses in defendant's pre-sentencing report. Ryan v. State, 245 So. 3d 491, 2017 Miss. App. LEXIS 466 (Miss. Ct. App. 2017).

It was not plain error to sentence defendant as an habitual offender because a failure to formally admit defendant's tendered prior convictions was mere oversight, as the convictions were provided to defense counsel, who stated no objection. Pinter v. State, 221 So. 3d 378, 2017 Miss. App. LEXIS 337 (Miss. Ct. App. 2017).

Circuit court properly found defendant to be a habitual offender, following defendant's conviction for being a felon in possession of a firearm, because certified copies of defendant's guilty pleas and sentencing orders were submitted showing that defendant was found guilty of accessory after the fact to burglary of a storehouse on two separate occasions. Foster v. State, 221 So. 3d 1054, 2017 Miss. App. LEXIS 317 (Miss. Ct. App. 2017).

In a case where defendant was convicted of shooting into a dwelling, he should not have been sentenced as a habitual offender because he lacked two qualifying convictions for enhancement; the State was only able to prove that one of defendant's prior convictions imposed a prison sentence of one year or more. He was sentenced to less than one year on a 1994 federal bank fraud conviction. Martin v. State, 214 So. 3d 217, 2017 Miss. LEXIS 92 (Miss. 2017).

There was insufficient evidence to demonstrate that defendant was a habitual offender under Miss. Code Ann. § 99-19-83 because there was no proof submitted as to whether he served one year or more on the Mississippi convictions; the Mississippi Department of Corrections records did not state or reflect that defendant had served one year or more on a violent-felony conviction. Due to double jeopardy, the State could not retry under

Miss. Code Ann. § 99-19-83; however, there was sufficient proof to sentence defendant under the enhancement provided by Miss. Code Ann. § 99-19-81. Brown v. State, 217 So. 3d 805, 2017 Miss. App. LEXIS 110 (Miss. Ct. App. 2017).

Defendant was properly indicted as a habitual offender because the indictments and sentencing orders from defendant's previous felonies were entered into evidence during the hearing at which defendant pleaded guilty to unlawful possession of a firearm by a convicted felon. Dedeaux v. State, 205 So. 3d 697, 2016 Miss. App. LEXIS 313 (Miss. Ct. App.), cert. denied, 205 So. 3d 1083, 2016 Miss. LEXIS 516 (Miss. 2016).

State failed to follow the statutory requirements to prove defendant's habitual-offender status because the record did not include sufficient information on whether his prior charges constituted at least two prior charges separately brought and arising out of separate incidents at different times. Floyd v. State, 155 So. 3d 883, 2014 Miss. App. LEXIS 317 (Miss. Ct. App. 2014), cert. denied, 154 So. 3d 33, 2015 Miss. LEXIS 48 (Miss. 2015).

In post-conviction proceedings, although a prisoner argued the application of the habitual offender statute, Miss. Code Ann. § 99-19-81, to his sentence was unconstitutional because his guilty pleas to two 1982 burglary convictions were unconstitutional, the issue was not properly before the appellate court due to the prisoner's failure to have previously challenged the validity of the guilty pleas, and, as such, the prior unchallenged convictions were valid when the trial court applied § 99-19-81; even if the prisoner's claims regarding the guilty pleas were properly before the appellate court, the claims would have been time-barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5. Williams v. State, 65 So. 3d 319, 2011 Miss. App. LEXIS 344 (Miss. Ct. App. 2011).

Trial court properly dismissed defendant's motion for postconviction relief after defendant pled guilty to uttering a forged instrument because defendant admitted during the plea colloquy that defendant had been convicted of two prior felonies in Wisconsin in 1987 and defendant stated that defendant had no objection to the indictment being amended to reflect that defendant was a habitual offender under the statute. Middleton v. State, 49 So. 3d 161, 2010 Miss. App. LEXIS 635 (Miss. Ct. App. 2010).

State did not have to prove the length of time defendant served on his prior offenses because Miss. Code Ann. § 99-19-81 did not require that defendant actually serve more than one year; instead, it merely required that defendant received a sentence for one year or more for two separate convictions. Peterson v. State, 37 So. 3d 669, 2010 Miss. App. LEXIS 58 (Miss. Ct. App. 2010).

In a case in which the trial court sentenced defendant as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, defendant successfully argued on appeal that the State failed to prove that he had two prior felony offenses and had received a sentence of at least one year for each conviction. The State acknowledged that the exhibits submitted to the appellate court did not include a copy, certified or non-certified, of a 1992 felony conviction for defendant. Williams v. State, 32 So. 3d 1222, 2009 Miss. App. LEXIS 855 (Miss. Ct. App. 2009).

Where appellant was convicted of selling a Schedule II controlled substance in violation of Miss. Code Ann. § 41-29-139, he had two previous felony convictions for grand larceny and the sale of a Schedule IV controlled substance. The circuit court determined he was eligible for enhanced sentencing as a habitual offender under Miss. Code Ann. §§ 99-19-81, 41-29-147 and sentenced him to thirty years in custody without parole. Lacey v. State, 29 So. 3d 786, 2009 Miss. App. LEXIS 305 (Miss. Ct. App. 2009), cert. denied, 2010 Miss. LEXIS 136 (Miss. Mar. 11, 2010).

Defendant who pleaded guilty to transfer of a controlled substance was properly sentenced as a habitual offender because his plea petition admitted his convictions for two prior felonies listed in the indictment. Madden v. State, 991 So. 2d 1231, 2008 Miss. App. LEXIS 107 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 507 (Miss. 2008).

Summary dismissal of two petitions for post-conviction relief was appropriate because the state met its burden of showing that defendant was a habitual offender under Miss. Code Ann. § 99-19-81 since one exhibit introduced during sentencing contained pen packs with convictions from Tennessee, Illinois, and the United States government. Harvey v. State, 973 So. 2d 251, 2007 Miss. App. LEXIS 442 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 50 (Miss. 2008).

Defendant's sentence as a habitual offender was appropriate because the introduction of original or certified copies of commitment papers was the common means to demonstrate prior convictions for purposes of enhanced sentencing as a habitual offender. Turner v. State, 962 So. 2d 691, 2007 Miss. App. LEXIS 182 (Miss. Ct. App. 2007), cert. dismissed, 997 So. 2d 924, 2008 Miss. LEXIS 506 (Miss. 2008).

In a case where defendant was convicted of kidnapping and simple assault, a trial court did not err by sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-81 because certified copies of his indictments and sentencing orders were competent evidence of his previous convictions; moreover, the trial court completed a bifurcated proceeding. Williams v. State, 960 So. 2d 506, 2006 Miss. App. LEXIS 786 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 385 (Miss. 2007), cert. denied, 552 U.S. 1068, 128 S. Ct. 722, 169 L. Ed. 2d 565, 2007 U.S. LEXIS 12894 (U.S. 2007).

Where defendant was indicted by the grand jury for armed robbery in violation of Miss. Code Ann. § 97-3-79, he was also indicted as a habitual offender having been convicted twice previously for felonies under Miss. Code Ann. § 99-19-81; the two prior felonies charged in the original indictment were grand larceny and bank robbery. Wilson v. State, 935 So. 2d 945, 2006 Miss. LEXIS 303 (Miss. 2006), cert. denied, 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088 (U.S. 2007).

In a grand larceny case, the trial court did not err in finding defendant was an habitual offender as pen-packs showing that he was sentenced to various prison terms provided sufficient evidence to show habitual status under Miss. Code Ann. § 99-19-81, and the State provided adequate notice under which statute they sought to proceed. Frazier v. State, 907 So. 2d 985, 2005 Miss. App. LEXIS 158 (Miss. Ct. App. 2005).

Evidence was sufficient under Miss. Code Ann. § 99-19-81 (2000) to support an habitual offender finding where the State introduced certified copies of three "pen packs," which were the records maintained on inmates sentenced to the custody of the Mississippi Department of Corrections and indicated defendant had had at least two prior felony convictions, and defendant's counsel indicated no objection to the admission of those pen packs. Jasper v. State, 858 So. 2d 149, 2003 Miss. App. LEXIS 673 (Miss. Ct. App. 2003), aff'd, 871 So. 2d 729, 2004 Miss. LEXIS 438 (Miss. 2004).

Plain error was found in defendant's enhanced sentencing as a habitual offender, where the criminal history report upon which the State and trial court relied did not appear in the record, and where there were no certified copies of any judgments of conviction, which are the best evidence of a conviction; in addition, the form of the amended indictment, insofar as the indictment purported to charge defendant as a habitual offender, was deficient, under Miss. Unif. Cir. & County Ct. Prac. R. 11.03(1), as the indictment did not fully acquaint defendant with the nature of the accusations. Vince v. State, 844 So. 2d 510, 2003 Miss. App. LEXIS 383 (Miss. Ct. App. 2003).

Two certified copies of commitment papers were sufficient evidence that the defendant was an habitual offender, notwithstanding the contention that the state failed to prove that the defendant was the same person named in those papers, where the defendant failed to introduce any evidence to rebut the presumption that he was the same person named in the papers and, therefore, the presumption arising from the identity of his name and the name in those papers was uncontested. Fikes v. State, 749 So. 2d 1107, 1999 Miss. App. LEXIS 544 (Miss. Ct. App. 1999).

At bifurcated hearing, as required under recidivist statutes, state must prove requirements set forth in habitual offender statute beyond reasonable doubt. Davis v. State, 680 So. 2d 848, 1996 Miss. LEXIS 495 (Miss. 1996).

Evidence of prior convictions in another state met the requirements of this section, even though the evidence contained references to a defendant with different middle initials, where the Department of Corrections serial number and the date of birth was the same throughout the records. Handley v. State, 574 So. 2d 671, 1990 Miss. LEXIS 857 (Miss. 1990), op. withdrawn, sub. op., 1991 Miss. LEXIS 235 (Miss. Apr. 16, 1991).

Certified copies of sentencing orders were proper proof of prior convictions, sufficient under habitual offender statute, where certification at issue contained attestation that copy was true and correct, and attestation bore seal of court; lack of book and page number were not fatal. Monroe v. State, 515 So. 2d 860, 1987 Miss. LEXIS 2764 (Miss. 1987).

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to § 99-19-45 may be introduced in evidence as proof of such conviction; the absence of a limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. Pace v. State, 407 So. 2d 530, 1981 Miss. LEXIS 2293 (Miss. 1981), overruled in part, Hopson v. State, 625 So. 2d 395, 1993 Miss. LEXIS 422 (Miss. 1993).

17. Particular circumstances.

After defendant was convicted, an amended sentencing order was issued, sentencing defendant to the maximum sentence as a habitual offender because defendant's two prior felonies of burglary of a dwelling and possession of a firearm by a convicted felon did not meet the requirements for the violent-habitual-offender statute. Harris v. State, 188 So. 3d 601, 2016 Miss. App. LEXIS 165 (Miss. Ct. App. 2016).

Defendant was properly sentenced for embezzlement as a habitual offender under Miss. Code Ann. § 99-19-81, even though under 42 Pa.C.S. § 9721(a)(1), the inmate's prior Pennsylvania burglary sentence of five years of probation was not a sentence to a term in a penal institution, as the Pennsylvania burglary sentence ran consecutively with a theft sentence to an indefinite term of up to 23 months' and under Pennsylvania law, the sentence imposed for a criminal offense was the maximum term. Aranyos v. State, 115 So. 3d 116, 2013 Miss. App. LEXIS 39 (Miss. Ct. App. 2013).

In a post-conviction relief case in which a pro se inmate appealed a circuit court's denial of his motion as time-barred, the inmate had been sentenced as a habitual and the fact that one of his convictions occurred before the enactment of Miss. Code Ann. § 99-19-81 did not create an illegal sentence excepted from the three-years statute of limitations found in Miss. Code Ann. § 99-39-5. Amerson v. State, 47 So. 3d 192, 2010 Miss. App. LEXIS 62 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 587 (Miss. 2010).

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), aff'd, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant, who was found guilty of burglary of a dwelling, fleeing or eluding a law enforcement officer in a motor vehicle, possession of a firearm by a convicted felon, and grand larceny, was found to be an habitual offender under Miss. Code

Ann. § 99-19-81; therefore, he received the maximum sentence for each count and was ineligible for parole or probation. Kirkwood v. State, 53 So. 3d 7, 2010 Miss. App. LEXIS 48 (Miss. Ct. App. 2010), aff'd, in part, rev'd, 52 So. 3d 1184, 2011 Miss. LEXIS 36 (Miss. 2011).

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), aff'd, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Although the record was insufficient to sentence defendant, who was convicted of murder, as a habitual offender under Miss. Code Ann. § 99-19-83, since the record did not show that defendant had served two separate terms of at least one year in a state or federal penal institution, the error was harmless, because there was sufficient evidence to sentence defendant as a habitual offender under Miss. Code Ann. § 99-19-81, and the resulting sentence was the same under either provision. Reed v. State, 31 So. 3d 48, 2009 Miss. App. LEXIS 611 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

In a case in which defendant appealed his conviction and sentence for felony driving under the influence (DUI) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, he argued unsuccessfully that the trial court erred in failing to grant his pretrial motion to suppress evidence because: (1) the police chief had no authority to stop or arrest him, (2) he never committed any offense in the chief's jurisdiction, (3) his arrest occurred when the pursuit to make the arrest began, and (4) he had not committed any felony at that time. When the police chief began his pursuit, it was not a pursuit for the purpose of making an arrest, rather, it was a pursuit to give a courtesy warning; at the time defendant was arrested at his home, he had committed the crime of felony DUI, as well as the crime of driving with a suspended license. Delker v. State, 50 So. 3d 309, 2009 Miss. App. LEXIS 597 (Miss. Ct. App. 2009), aff'd, 50 So. 3d 300, 2010 Miss. LEXIS 529 (Miss. 2010).

Motion for post-conviction relief was denied because Miss. R. Evid. 609 had no bearing upon the use of prior convictions to enhance a sentence; moreover, the prior convictions in this case were properly used for the enhancement of his sentence for credit card fraud under Miss. Code Ann. § 99-19-81 not to impeach his testimony under Miss. R. Evid. 609, and there was no provision limiting the use of prior convictions that were over 10 years old. Shies v. State, 19 So. 3d 770, 2009 Miss. App. LEXIS 143 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

In an armed robbery case, defendant was improperly sentenced to life imprisonment as a habitual offender under Miss. Code Ann. § 99-19-81 because a life sentence had to be, but was not, set by a jury. Carey v. State, 4 So. 3d 370, 2008 Miss. App. LEXIS 521 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 114 (Miss. 2009).

Where appellant used a deadly weapon to strike his current spouse and to shoot another victim, he entered pleas of guilty to aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) and aggravated domestic violence in violation of Miss. Code Ann. § 97-3-7(4). Appellant was properly sentenced as a habitual criminal under Miss. Code Ann. § 99-19-81; the portion of the indictment charging him as a habitual offender was not defective under Miss. Unif. Cir. & County Ct. Prac. R. 7.06. McComb v. State, 986 So. 2d 1087, 2008 Miss. App. LEXIS 410 (Miss. Ct. App. 2008), cert. dismissed, 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Movant for post-conviction relief did not receive an illegal sentence when a circuit court placed the movant on a suspended sentence because, as a habitual offender, the movant would have received the maximum sentence; the movant suffered no injury or prejudice from receiving a lawful, yet lenient, sentence, and he was not entitled to any relief. Watts v. State, 1 So. 3d 886, 2008 Miss. App. LEXIS 397 (Miss. Ct. App. 2008), cert. dismissed, 999 So. 2d 852, 2009 Miss. LEXIS 33 (Miss. 2009), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 16 (Miss. 2009).

Defendant's sentence as a habitual offender after he was convicted of the possession of cocaine and the possession of hydromorphone was constitutional because he was sentenced to 108 years under Miss. Code Ann. § 41-29-147, and that sentence was within statutory limits; Miss. Code Ann. § 99-19-81 provides that a person sentenced as a habitual offender is to be sentenced to the maximum term of imprisonment. Roach v. State, 7 So. 3d 932, 2007 Miss. App. LEXIS 538 (Miss. Ct. App. 2007), rev'd, 7 So. 3d 911, 2009 Miss. LEXIS 199 (Miss. 2009).

Motion for post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine under Miss. Code Ann. § 41-29-139(a) since his 20-year sentence was not illegal; because he was a habitual offender, defendant should have actually received a mandatory 30-year sentence. Rucker v. State, 955 So. 2d 958, 2007 Miss. App. LEXIS 284 (Miss. Ct. App. 2007).

Inmate's request for post-conviction relief was denied because Miss. Code Ann. § 99-19-81 (Rev. 2000) did not require that the underlying felonies be committed after the age of 21 or that the sentences imposed be served in a federal or state penitentiary. Kelley v. State, 913 So. 2d 379, 2005 Miss. App. LEXIS 277 (Miss. Ct. App. 2005).

The trial court had jurisdiction to sentence the defendant as an habitual offender where the state offered two crimes to support the defendant's habitual offender status, one of which was a previous conviction for robbery by use of deadly weapon, and the other a conviction for an unlawful transaction with a minor for which he was sentenced to five years, although the sentence was probated for five years subject to his continuing to meet certain conditions, therefore relieving him of the burden of incarceration. Anderson v. State, 766 So. 2d 133, 2000 Miss. App. LEXIS 410 (Miss. Ct. App. 2000).

Defendant's ex post facto rights were knowingly waived where there was testimony that defendant's attorneys indicated that defendant would waive any and all rights to effectuate the plea agreement for armed robbery as an habitual offender, and thus avoid a possible death sentence on a murder charge. Bell v. State, 751 So. 2d 1035, 1999 Miss. LEXIS 400 (Miss. 1999).

The defendant was properly sentenced as an habitual offender, notwithstanding that the indictment incorrectly stated the number of years to which he was sentenced on a prior conviction. Black v. State, 724 So. 2d 996, 1998 Miss. App. LEXIS 1046 (Miss. Ct. App. 1998).

Habitual offender sentence imposed on defendant convicted of possession of cocaine with intent to deliver, requiring defendant to pay 30,000 fine and to serve 30 years without possibility of early parole, was not excessive and did not constitute cruel and unusual punishment: applicable sentencing statute allowed fines of 1,000 to 1 million and prison terms of up to 30 years. Sanders v. State, 678 So. 2d 663, 1996 Miss. LEXIS 300 (Miss. 1996).

Article 6, § 169 of the Mississippi Constitution was violated where language in an indictment charging the defendant as an habitual offender came after the words "against the peace and dignity of the state," since § 169 clearly states that a criminal indictment must "conclude" with those words; thus, the portion of the indictment charging the defendant as an habitual offender was fatally defective, and his sentence as an habitual offender would be reversed. McNeal v. State, 658 So. 2d 1345, 1995 Miss. LEXIS 282 (Miss. 1995).

In a prosecution for the sale of cocaine in violation of § 41-29-139, in which the defendant was convicted and sentenced as a habitual offender to 30 years' imprisonment, the evidence was sufficient to prove that the defendant was a habitual offender under this section where the defendant had previously pled guilty to the sale of less than one ounce of marijuana on 2 separate occasions for which he had received a 3-year suspended sentence and a one-year sentence, and certified copies of the indictments and sentencing orders in these prior cases were introduced into evidence at the sentencing hearing. Moore v. State, 631 So. 2d 805, 1994 Miss. LEXIS 73 (Miss. 1994).

Sentence of life imprisonment was required by this section because defendant had previously been convicted of 2 separate felonies arising out of separate incidents at different times and had been sentenced to separate terms of one year or more, and maximum term of imprisonment for the crime of rape was life imprisonment. Johnson v. State, 511 So. 2d 1360, 1987 Miss. LEXIS 2667 (Miss. 1987).

Trial court did not err in sentencing defendant as habitual offender based, in part, on 2 previous felony convictions in Iowa, where those prior guilty pleas sufficiently showed on their face that defendant entered pleas knowingly and voluntarily, despite contention of defendant that there was nothing on face of either Iowa conviction indicating that he understood nature and consequences of his guilty pleas. Moore v. State, 508 So. 2d 666, 1987 Miss. LEXIS 2589 (Miss. 1987).

Absent a recommendation of the jury for a life sentence, imposition of such sentence on the defendant convicted of armed robbery, and sentenced as an habitual criminal, was error. Watkins v. State, 500 So. 2d 462, 1987 Miss. LEXIS 2246 (Miss. 1987).

A defendant convicted of uttering a forgery, who was also indicted as, and proven to be, a recidivist, was properly sentenced to 15 years in prison pursuant to this section. Burt v. State, 493 So. 2d 1325, 1986 Miss. LEXIS 2490 (Miss. 1986).

Sentencing of defendant, who has entered plea of guilty to charge of capital murder, as habitual offender under this section, to serve life in prison without parole does not constitute unconstitutional cruel and unusual punishment. Bridges v. State, 482 So. 2d 1139, 1986 Miss. LEXIS 2359 (Miss. 1986).

Defendant who had previously been convicted of 3 separate felonies, but whose only conviction for crime of violence is one for which he is currently under sentence, is not properly subject of life sentence as habitual offender. Davis v. State, 477 So. 2d 223, 1985 Miss. LEXIS 2136 (Miss. 1985).

Sentencing convicted defendant to life imprisonment under § 99-19-83 is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7-year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under this section. Smith v. State, 477 So. 2d 191, 1985 Miss. LEXIS 2067 (Miss. 1985).

Imposition of 40 years' imprisonment under habitual offender statute (this section), which cannot be reduced or suspended and for which defendant cannot be eligible for probation or parole, upon conviction for armed robbery based on theft of meat during which defendant displayed pocket knife to avoid apprehension will be vacated, and additional sentence hearing and resentencing required, where adequate presentencing hearing was not held, even though trial judge afforded every opportunity to defendant and counsel to present mitigating evidence at that hearing. Presley v. State, 474 So. 2d 612, 1985 Miss. LEXIS 2190 (Miss. 1985).

Defendant's argument, after being sentenced as a habitual offender to 15 years in prison without eligibility for probation or parole following his conviction for uttering a forged check, that the enhancement statute (this section) constituted an ex post facto law in violation of the United States Constitution, Art I, § 10, inasmuch as his prior convictions had occurred before the enhancement statute became effective, was without merit, where defendant's sentence as a habitual criminal was not to be viewed as either a new jeopardy or an additional penalty for his earlier crimes, but rather, as a stiffened penalty for his latest crime, which was an aggravated offense in that it was a repetitive one. Smith v. State, 465 So. 2d 999, 1985 Miss. LEXIS 1918 (Miss. 1985).

In a prosecution for burglary, where defendant had been previously convicted of two separate felonies, the circuit judge did not err in sentencing defendant under this section, since the State's production of records indicating previous felonies furnished a presumption of identity which defendant could have easily overcome, had it been erroneous. Course v. State, 461 So. 2d 770, 1984 Miss. LEXIS 2065 (Miss. 1984).

The trial court properly sentenced defendant convicted or burglary to a term of 10 years without eligibility for probation or parole, where defendant had twice previously been convicted of crimes. Hall v. State, 427 So. 2d 957, 1983 Miss. LEXIS 2444 (Miss. 1983).

Although defendant, convicted of rape, was sentenced under the wrong habitual offender statute, remand for resentencing was not necessary, where the sentence imposed was in fact correct. Taylor v. State, 426 So. 2d 775, 1983 Miss. LEXIS 2328 (Miss. 1983).

A defendant who had been sentenced to 40 years in prison for business burglary would have the sentence modified to delete the provision which stated "that sentence shall not be reduced or suspended nor shall you be eligible for parole or probation" where the indictment did not meet the requirements of the statute in that it did not state the court in which the defendant had been convicted, the date of the judgment, the nature or the description of the offense for which he had been convicted previously, or that he had been sentenced to serve one year or more in a state or federal prison. Ard v. State, 403 So. 2d 875, 1981 Miss. LEXIS 2186 (Miss. 1981).

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under § 97-3-53 was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. Woods v. State, 393 So. 2d 1319, 1981 Miss. LEXIS 1904 (Miss. 1981).

In a prosecution for the felonious sale of a controlled substance, defendant was properly sentenced as an habitual criminal where he had three prior burglary convictions and in each case had received a sentence of more than one year in a state penal institution, even though the last two convictions occurred after the date he had committed the offense in the present case. Jordan v. State, 383 So. 2d 495, 1980 Miss. LEXIS 1971 (Miss. 1980).

In a prosecution for burglary, the trial properly sentenced defendant as a habitual offender, despite defendant's contention that the habitual offender statute only applied to those habitual offenders twice convicted of distinct felonies who had served sentences through actual incarceration; the statute is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of subsequent probation or suspension of sentence. Jackson v. State, 381 So. 2d 1040, 1980 Miss. LEXIS 1921 (Miss. 1980).

In a prosecution for burglary in which defendants were indicted as habitual offenders, the trial court did not commit reversible error in overruling one defendant's demurrer to the indictment, even though the indictment was fatally defective in its attempt to charge defendants as habitual offenders for its failure to set out the jurisdictions in which the previous convictions had been obtained, where the trial court acquitted that defendant of the habitual offender charge; as to the second defendant, who was found guilty on the habitual offender charge, the case against him would be remanded for resentencing as other that a habitual offender. Neither defendant was prejudiced by the habitual offender charge since no evidence of prior convictions was introduced in the trial on the principal charge. Usry v. State, 378 So. 2d 635, 1979 Miss. LEXIS 2540 (Miss. 1979).

In a prosecution for uttering a forgery, the case would be remanded to determine whether the maximum sentence had been improperly imposed pursuant to the habitual criminal statute, which was not part of the indictment, as required, or whether it had been properly imposed pursuant to the general sentencing statute for this crime. Bell v. State, 355 So. 2d 1106, 1978 Miss. LEXIS 2001 (Miss. 1978).

18. Sentence not excessive.

Defendant's sentence did not exceed the maximum permitted by law because defendant's indictment for possession of less than one-tenth of one gram of cocaine as a felony was amended to reflect defendant's status as a habitual offender and subsequent drug offender for sentencing purposes in the event defendant was convicted. Therefore, because defendant was convicted as a habitual and subsequent offender, the court sentenced defendant to the statutorily required sentence of imprisonment. Parker v. State, 208 So. 3d 19, 2017 Miss. App. LEXIS 12 (Miss. Ct. App. 2017).

Defendant's 30-year sentence for possession of more than 40 dosage units of benzylpiperazine was not excessive and did not constitute cruel and unusual punishment, as it was within the statutory limits of Miss. Code Ann. § 41-29-139(c)(1)(E). Varnado v. State, 201 So. 3d 483, 2015 Miss. App. LEXIS 529 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 1133, 2016 Miss. LEXIS 429 (Miss. 2016).

Because defendant's sentence of thirty years without parole for the offense of kidnapping was within the statutory limits, it was not contrary to the law. Although defendant could have received a life sentence under the kidnapping statute, the State of Mississippi did not seek a life sentence, and defendant's sentence was subject to enhancement because the victim was older than sixty-five, defendant used a gun, and defendant was a habitual offender. Burrell v. State, 183 So. 3d 19, 2015 Miss. LEXIS 531 (Miss. 2015).

Defendant's 126-year sentence for selling cocaine, methamphetamine, and marijuana was not disproportionate to the crimes because the sentence was statutorily authorized, as (1) Miss. Code Ann. § 41-29-139(b)(1) and (3) permitted maximum sentences of 30 years and 3 years, (2) Miss. Code Ann. § 99-19-81 required a maximum sentence, as defendant was convicted of a third felony, (3) the doubling of each maximum sentence was authorized by Miss. Code Ann. § 41-29-147, based on defendant's prior drug conviction, and (4) Miss. Code Ann. § 99-19-21 authorized the court to order that the sentences run consecutively. Mosley v. State, 104 So. 3d 839, 2012 Miss. LEXIS 465 (Miss. 2012).

After pleading guilty to two counts of selling less than 30 grams of marijuana, Miss. Code Ann. § 41-29-139(b)(3), and receiving a nine-year sentence, an inmate's post-conviction relief motion, claiming the sentence constituted cruel and unusual punishment, was properly dismissed because although the maximum sentence for each count was three years, the inmate was subject to enhanced punishment as a subsequent offender, pursuant to Miss. Code Ann. § 41-29-147, and as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81; the sentence did not exceed the statutory maximum. Wooten v. State, 73 So. 3d 547, 2011 Miss. App. LEXIS 334 (Miss. Ct. App. 2011).

Defendant's conviction as a habitual offender under Miss. Code Ann. § 99-19-81 did not violate the Separation of Powers Doctrine, the Supremacy Clause, or the Sixth or Fourteenth Amendments to the U.S. Constitution. Johnson v. State, 29 So. 3d 738, 2009 Miss. LEXIS 610 (Miss. 2009).

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that her sentence was unconstitutional as it exceeded the maximum sentence allowed by law. As she was a habitual offender, the circuit court was required under Miss. Code Ann. § 99-19-81 to impose the maximum sentence for grand larceny, which, under Miss. Code Ann. § 97-17-41, was 10 years and a fine of $ 10,000. Williams v. State, 24 So. 3d 360, 2009 Miss. App. LEXIS 940 (Miss. Ct. App. 2009).

Defendant's 60-year sentence after he was convicted for the possession of methamphetamine precursors was appropriate and not disproportionate because it was within the legislature's prerogative to determine that three drug offense could result in a sentence of 60 years. The sentence was harsh, but not grossly disproportionate. Houser v. State, 29 So. 3d 813, 2009 Miss. App. LEXIS 562 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he failed to request a bifurcated hearing on his habitual offender status; even if the error had been preserved, a hearing was not required because he entered a guilty plea to the principal charge. Rucker v. State, 955 So. 2d 958, 2007 Miss. App. LEXIS 284 (Miss. Ct. App. 2007).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err, in admitting his prior felony convictions after analyzing them under Miss. R. Evid. 403 they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. Carter v. State, 953 So. 2d 224, 2007 Miss. LEXIS 203 (Miss. 2007).

Defendant's sentences of 30 years and 25 years in prison for his convictions of rape and burglary of a dwelling, to be served consecutively, did not constitute cruel and unusual punishment because the trial court imposed sentences within the statutory limits for the crimes, and a threshold comparison of defendant's sentence with his crimes did not raise an inference of gross disproportionality that would trigger the Solem proportionality analysis. Magee v. State, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Petitioner's third motion for post-conviction relief was properly denied where he was properly sentenced to life in prison without parole after he pled guilty to capital murder as a habitual offender under Miss. Code Ann. § 99-19-101; arguing a technical defect between the sentencing under Miss. Code Ann. § 99-19-81, as opposed to Miss. Code Ann. § 99-19-83, was of little or no effect. Clark v. State, 960 So. 2d 521, 2006 Miss. App. LEXIS 815 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 394 (Miss. 2007).

Defendant was indicted and sentenced as a subsequent offender under Miss. Code Ann. § 41-29-147 and as a habitual offender under Miss. Code Ann. § 99-19-81 for the crime of sale of a controlled substance; drug sentences were distinguished from sentences for crimes that required a judge to impose a sentence reasonably expected to be less than life in the absence of a jury recommending a life sentence. Hudderson v. State, 941 So. 2d 221, 2006 Miss. App. LEXIS 803 (Miss. Ct. App. 2006).

Three different statutory enhancements were properly used in sentencing defendant to 32 years' imprisonment for cocaine possession while possessing a firearm and firearm possession by a convicted felon; because he had been twice previously convicted of felonies, and sentenced to separate terms of at least one year, the maximum base term of imprisonment for possession, eight years under Miss. Code Ann. § 41-29-139(c)(1)(B), Miss. Code Ann. § 99-19-81, applied; because he also possessed a firearm, that sentence was doubled to 16 years, and because he had been previously convicted of a drug offense, the trial judge doubled the sentence again to arrive at a 32-year sentence. Mosley v. State, 930 So. 2d 459, 2006 Miss. App. LEXIS 401 (Miss. Ct. App. 2006).

In a case where defendant was convicted of two counts of possession with intent to distribute and sentenced as an habitual offender, because the trial judge could consider societal concerns during sentencing, and because the judge did not exceed the maximum penalties, the trial judge did not err in sentencing defendant to 30 years for each count. Cannon v. State, 918 So. 2d 734, 2005 Miss. App. LEXIS 166 (Miss. Ct. App. 2005), cert.

denied, 2005 Miss. LEXIS 537 (Miss. Aug. 25, 2005), aff'd in part and rev'd in part, 919 So. 2d 913, 2005 Miss. LEXIS 764 (Miss. 2005).

Defendant's effective sentence of 60 years without parole for a drug offense where none of his prior convictions involved crimes of violence was within the statutory guidelines prescribed by the legislature under Miss. Code Ann. §§ 41-29-147 and 99-19-81; additionally, although harsh, defendant's sentence was not grossly disproportionate to his crime. It was within the legislature's prerogative to determine that three crimes such as those committed by defendant could result in a sentence of 60 years without parole or chance of early release; thus, defendant's sentence did not violate the federal or state constitutional prohibitions of cruel and unusual punishment. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Where defendant was sentenced to consecutive sentences of 60 years for the sale of cocaine and 32 years for the possession of a certain quantity of cocaine, the sentences were within the limits of those set out by the Mississippi Legislature and, under the circumstances of the case, where defendant fit plainly within the category of repeat drug offender, since all his convictions shown in the record related to narcotic possession or narcotic trafficking, the sentences were not so unreasonably harsh as to invoke constitutional considerations of cruel and unusual punishment. Wright v. State, 863 So. 2d 1005, 2004 Miss. App. LEXIS 10 (Miss. Ct. App. 2004).

19. Unadjudicated offenses.

Defendant who has been convicted of one violent crime at the time he is sentenced for a second crime of violence clearly comes within the purviews of Miss. Code Ann. § 99-19-81, even though his sentence for the first conviction is not adjudged until after the second is committed. Willie v. State, 876 So. 2d 278, 2004 Miss. LEXIS 473 (Miss. 2004).

20. Habitual offender sentences.

Because pen-packs constituted sufficient evidence, there was no error regarding defendant's status as a habitual offender and related sentencing; there was sufficient evidence defendant was a career burglar, five felony convictions, in addition to five more felony convictions in his pen-pack, dating from 1995 to 2012, all related to stolen property. Gales v. State, 299 So. 3d 861, 2020 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 300 So. 3d 43, 2020 Miss. LEXIS 314 (Miss. 2020).

In a case in which defendant was convicted of felony exploitation of a vulnerable adult, the trial court did not err in sentencing defendant as a habitual offender to the maximum 10 years' imprisonment without parole because the State presented certified copies of two of defendant's out-of-state felony convictions and sentencing records. Small v. State, — So. 3d —, 2020 Miss. LEXIS 371 (Miss. Oct. 8, 2020).

Trial court properly sentenced defendant as a habitual offender to 25 years in prison after a jury found him guilty of burglary of a dwelling because two of his accomplices testified that they went to the victim's house with defendant and one other person, made their way inside the house, and stole several items, and, after the State rested its case in chief, defendant chose not to offer any proof and rested. Alston v. State, 287 So. 3d 182, 2019 Miss. LEXIS 406 (Miss. 2019).

Petitioner never raised the argument that he should not have been sentenced as a nonviolent habitual offender, plus his three prior convictions were listed in an exhibit to the indictment and the sentencing orders related to his prior convictions were entered into evidence without objection; thus, the issue was waived and without merit. Thompson v. State, 285 So. 3d 704, 2019 Miss. App. LEXIS 569 (Miss. Ct. App. 2019).

Petitioner was given illegally lenient sentences because he was not sentenced to the maximum term of imprisonment, as required by the statute. Thompson v. State, 285 So. 3d 704, 2019 Miss. App. LEXIS 569 (Miss. Ct. App. 2019).

State presented insufficient evidence to make the requisite showing under Miss. Code Ann. § 99-19-83 because the exhibits did not demonstrate that defendant had been convicted of at least two previous felony convictions and sentenced to and served separate terms of one year or more for each conviction; defendant's sentences was vacated, and the case was remanded for resentencing because the evidence at the sentencing hearing would have met only the requirements of Miss. Code Ann. § 99-19-81. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Defendant was not improperly sentenced as a habitual offender because he had ample notice and opportunity to prepare a defense against an enhanced sentence, but he failed to do so; well in advance of his trial, the State moved to amend defendant's indictment to seek an enhanced sentence, and defendant received a copy of the motion, which specifically detailed two of his prior felony convictions that resulted in a sentence of one year or more. Lofton v. State, 248 So. 3d 798, 2018 Miss. LEXIS 183 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 1569, 203 L. Ed. 2d 731, 2019 U.S. LEXIS 2762 (U.S. 2019).

Defendant's sentence as a habitual offender was not illegal because the State admitted the presentence investigation report, containing certified copies of defendant's three prior felony convictions, into evidence during the sentencing hearing, and the trial judge recessed the hearing in order for defendant and his second attorney to review the report. Ware v. State, 263 So. 3d 675, 2018 Miss. App. LEXIS 459 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 666, 2019 Miss. LEXIS 76 (Miss. 2019).

It was error to base defendant's habitual offender sentence on a conviction for possession of alprazolam because that crime was a misdemeanor. Pinter v. State, 221 So. 3d 378, 2017 Miss. App. LEXIS 337 (Miss. Ct. App. 2017).

Trial court should not have imposed a sentence of 10 years for burglary of a dwelling in a habitual offender case because the habitual offender statute required the trial court to impose the maximum term of imprisonment for burglary of a dwelling, which was 25 years. Moran v. State, 235 So. 3d 101, 2017 Miss. App. LEXIS 142 (Miss. Ct. App. 2017).

Trial court did not abuse its discretion in sentencing defendant as an habitual offender to thirty years for possession of cocaine with intent to distribute because it was the maximum prison penalty at the time of his original sentence; defendant's original sentence was imposed when the maximum sentence prescribed for the crime was thirty years, and the statute that lowered the maximum penalty did not take effect until more than five years after the initial sentence Wells v. State, 202 So. 3d 1230, 2016 Miss. LEXIS 445 (Miss. 2016).

Defendant was properly convicted of sexual battery of his 11-year-old cousin (the victim) and sentenced as a habitual offender to life imprisonment because the defense was given every opportunity available to impeach a witness's testimony, the defense failed to provide timely notice of its intent to submit evidence of the victim's prior sexual behavior, the status of the victim's grandfather (with whom she lived) as registered as a sex offender was irrelevant, a life sentence without parole was mandatory upon defendant's conviction, the jury was properly instructed regarding its duty, defendant failed to show any prejudice stemming from the delay in bringing him to trial, and the record did not show that counsel was ineffective. Keys v. State, 213 So. 3d 515, 2016 Miss. App. LEXIS 616 (Miss. Ct. App.), cert. denied, 205 So. 3d 1082, 2016 Miss. LEXIS 538 (Miss. 2016).

Appellate court found no manifest miscarriage of justice resulted from defendant's sentence as a habitual offender in that defendant did not contest during a pretrial hearing the State of Mississippi's motion to amend the indictment to reflect defendant's prior felony convictions, in which the State offered certified copies of the sentencing orders related to defendant's prior felony convictions, or contest during the sentencing hearing defendant's sentence as a habitual offender. Graham v. State, 204 So. 3d 329, 2016 Miss. App. LEXIS 113 (Miss. Ct. App. 2016).

Trial court erred when it sentenced defendant as an habitual offender because his flight was inextricably intertwined with his commission of larceny where he stole items so he could take them somewhere else, and he still was engaged in the crime of larceny when he fled police, which was a single chain of events arising out of a common nucleus of operative fact. Drummer v. State, 167 So. 3d 1180, 2015 Miss. LEXIS 349 (Miss. 2015).

Defendant's commitment form indicated that defendant was classified as a habitual offender pursuant to this section. This was in error, as there was no evidence to support such a classification, and the circuit court was directed to correct this error. Brown v. State, 166 So. 3d 565, 2015 Miss. App. LEXIS 332 (Miss. Ct. App. 2015).

Circuit did not err in denying appellant's pro se motion for post-conviction relief because his sentence for malicious mischief was not illegal; Miss. Code Ann. § 99-19-81 mandated that the circuit court impose the maximum sentence prescribed by Miss. Code Ann. § 97-17-67. Sellers v. State, 167 So. 3d 268, 2015 Miss. App. LEXIS 315 (Miss. Ct. App. 2015).

Because defendant was sentenced for manslaughter as a habitual offender, and Section 99-19-81 Miss. Code Ann. required that he receive the mandatory maximum sentence of 20 years, the enhanced penalty provided under Section 97-37-37 was not applicable. Enhancement under Section 97-37-37 applies only to the extent that a greater minimum sentence is not otherwise provided by another provision of law. Harvey v. State, 191 So. 3d 1270, 2015 Miss. App. LEXIS 524 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 208, 2016 Miss. LEXIS 212 (Miss. 2016).

Since both convictions derived from the same materials, the same investigation, and the same officers, it would have been inequitable to permit the federal conviction to be used to support defendant's habitual offender status, even though the charges were brought in different forums, and the judgment was reversed as to the habitual-offender sentence only. Triplett v. State, 145 So. 3d 1256, 2014 Miss. App. LEXIS 439 (Miss. Ct. App. 2014).

Defendant's felony flight was properly used to sentence defendant as a habitual offender when defendant committed attempted grand larceny the same day, because the flight did not grow out of the larceny's asportation element, as the larceny was complete upon the stolen property's pre-flight movement. Drummer v. State, 167 So. 3d 1222, 2014 Miss. App. LEXIS 379 (Miss. Ct. App. 2014), aff'd in part and rev'd in part, 167 So. 3d 1180, 2015 Miss. LEXIS 349 (Miss. 2015).

Defendant was properly sentenced as a nonviolent habitual offender because, while he had not served a year in prison for one of the felony-convictions in the indictment, he was served with a copy of the State's motion to amend the indictment, which resulted in his indicted status being changed from non-habitual offender to habitual offender, and defendant had adequate notice and was not unfairly surprised by the State's use of his prior convictions. Curry v. State, 131 So. 3d 1232, 2013 Miss. App. LEXIS 681 (Miss. Ct. App. 2013).

Court committed plain error by sentencing defendant as a habitual offender because the State failed to place certified copies of his prior convictions into the record or to offer any evidence to support his habitual-offender status, other than a recitation of his prior felony convictions. Grayer v. State, 2013 Miss. LEXIS 187 (Miss. May 2, 2013), op. withdrawn, sub. op., 120 So. 3d 964, 2013 Miss. LEXIS 370 (Miss. 2013).

Although an inmate was a candidate for sanctions under Miss. Code Ann. § 47-5-138(3)(a) and (b) for filing successive, frivolous motions for post-conviction relief, such sanctions would have no effect because he had been sentenced as a habitual offender under Miss. Code Ann. § 99-19-81, and thus had no earned time to forfeit. Clay v. State, 168 So. 3d 987, 2013 Miss. App. LEXIS 147 (Miss. Ct. App. 2013), cert. dismissed, 2013 Miss. LEXIS 651 (Miss. Dec. 12, 2013).

Where defendant was convicted of one count of armed robbery as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, the trial court did not err by imposing a 19.5 year sentence because it did not exceed his life expectancy of 20.2 years. Hampton v. State, 148 So. 3d 1038, 2013 Miss. App. LEXIS 73 (Miss. Ct. App. 2013), aff'd, 148 So. 3d 992, 2014 Miss. LEXIS 513 (Miss. 2014).

Habitual offender's sentence with portions of sentences on two counts suspended could not be considered illegal under Miss. Code Ann. § 99-19-81, which did not allow a suspension of sentence for a habitual offender, because the legality of a sentence could not be attacked for being lighter than it should have been. Easley v. State, 60 So. 3d 812, 2011 Miss. App. LEXIS 235 (Miss. Ct. App. 2011).

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper under Miss. Code Ann. §§ 41-29-147 and 99-19-81 where the trial court's opening remarks on voir dire did not constitute reversible error and defendant did not object at trial; further, defendant failed to establish ineffective assistance of counsel; counsel negotiated a plea that defendant refused and succeeded in having the trial court dismiss the portion of the indictment dealing with the sale occurring within 1,500 feet of a public park. Easter v. State, 878 So. 2d 10, 2004 Miss. LEXIS 484 (Miss. 2004).

Cited in: Hughery v. State, 915 So. 2d 457, 2005 Miss. App. LEXIS 265 (Miss. Ct. App.), cert. denied, 921 So. 2d 1279, 2005 Miss. LEXIS 779 (Miss. 2005).

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Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 A.L.R.2d 1186.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal. 79 A.L.R.2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 A.L.R.2d 1196.

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Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Validity and construction of statute or ordinance mandating imprisonment for habitual or repeated traffic offender. 2 A.L.R.4th 618.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 A.L.R.5th 263.

Vulnerability of victim as aggravating factor under state sentencing guidelines. 73 A.L.R.5th 383.

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§ 99-19-83. Sentencing of habitual criminals to life imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections.

HISTORY: Laws, 1976, ch. 470, § 2; Laws, 2014, ch. 457, § 78, eff from and after July 1, 2014.

Cross References — Admissibility of properly authenticated offender's records cover sheet when offered for the purpose of enhanced sentencing under this section or § 41-29-147 or 99-19-81 or other similar purposes, see § 47-5-10.

Inmate convicted as habitual offender ineligible for earned time allowance on sentence, see § 47-5-139.

Ineligibility of confirmed and hardened criminals for parole, see § 47-7-3.

Sentencing of habitual criminals to maximum term of imprisonment, see § 99-19-81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Double jeopardy.
3. Ex post facto.
4. Sentencing trial or hearing, generally.
5. —When held.
6. Indictment.
7. — Indictment, amendment of.
8. Right to speedy trial.
9. Constitutionality.
10. Appeals by State.
11. Habitual offender portion of indictment.
12. Proof of prior conviction; in Mississippi.
13. —Out of state.
14. Jury instructions.
15. Validity of guilty plea.
16. Particular circumstances.
17. Previous concurrent sentences.
18. Time served.
19. Effective assistance of counsel.

1. In general.

Mississippi's habitual-offender statute is unambiguous; thus, the courts do not see the need to consider other jurisdictions' analyses of their own habitual-offender statutes. Logan v. State, 192 So. 3d 1012, 2015 Miss. App. LEXIS 429 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1267, 2016 Miss. LEXIS 238 (Miss. 2016).

Defendant's argument that the State failed to meet its burden of proving his habitual-offender status was procedurally barred because defndant never raised it before the trial court; however because defendant argued that the State failed to submit evidence proving his habitual-offender status at the sentencing hearing, the argument was reviewable as plain error Conner v. State, 138 So. 3d 143, 2014 Miss. LEXIS 246 (Miss. 2014).

Sexual intercourse between an underage child and an adult clearly is a crime of violence for purposes of the habitual offender statute, as sexual intercourse cannot occur without the exertion of some degree of physical force, even if it entails no pain or bodily harm and leaves no mark. The same is true for any other sex-crime victim who lacks the capacity to consent. Taylor v. State, 122 So. 3d 707, 2013 Miss. LEXIS 395 (Miss. 2013).

Similar to Miss. Code Ann. § 99-19-81, the violent-habitual-offender statute, Miss. Code Ann. § 99-19-83, includes no language requiring that the underlying felonies must have been committed at or above a certain age. Skinner v. State, 120 So. 3d 419, 2013 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 452 (Miss. 2013).

Defendant's life sentence following his conviction of attempted burglary of an automobile was not unconstitutionally disproportionate to his offense because defendant had previously been convicted of robbery and two burglary offenses; as such, the trial court did not abuse its discretion in sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-83. Hawkins v. State, 11 So. 3d 123, 2008 Miss. App. LEXIS 744 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 285 (Miss. 2009).

When defendant was sentenced to a life sentence as a habitual offender following his conviction for possession of cocaine, the sentence was not unconstitutional because the state properly amended defendant's indictment, and defendant was made aware that if he were to be found guilty he would be sentenced as a habitual offender. Williams v. State, 963 So. 2d 565, 2007 Miss. App. LEXIS 73 (Miss. Ct. App. 2007).

Defendant argued that the sentence of 15 years' imprisonment was illegal, as he was previously convicted of a violent crime, thus making him ineligible for a sentence any less than life imprisonment, pursuant to Miss. Code Ann. § 99-19-83; however, this argument was without merit where he actually benefitted from the sentence by receiving 15 years' imprisonment, rather than life imprisonment, and his motion for post-conviction relief failed as it was procedurally barred by Miss. Code Ann. § 99-39-27(9) and time barred by Miss. Code Ann. § 99-39-5(2). Cook v. State, 910 So. 2d 745, 2005 Miss. App. LEXIS 225 (Miss. Ct. App. 2005).

While the life sentence defendant received under the habitual offender statute, Miss. Code Ann. § 99-19-83(3), was indeed harsh for the robbery offense he committed, the Mississippi Legislature had determined that the sentence defendant received was a proper sentence for a habitual offender. All the requirements for § 99-19-83(3) had been met and it was not up to the court to change the sentencing scheme because that responsibility was exclusively within the province of the Legislature. Jones v. State, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

As an inmate had two prior felony convictions, one of which was for aggravated assault, he could have been indicted as an habitual offender under Miss. Code Ann. § 99-19-83; therefore, his counsel did not provide ineffective assistance by warning him that this would occur unless he pled guilty. Hearvey v. State, 887 So. 2d 836, 2004 Miss. App. LEXIS 926 (Miss. Ct. App. 2004).

Defendant was handed his sentence of life imprisonment without parole because he was a recidivist who committed the felony of uttering a forgery; defendant's sentence was justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. Miles v. State, 864 So. 2d 963, 2003 Miss. App. LEXIS 1039 (Miss. Ct. App. 2003).

A defendant who enters a plea of guilty is not entitled to a hearing separate from the guilty plea hearing on the question of whether he or she should be sentenced as a habitual offender. Keyes v. State, 549 So. 2d 949, 1989 Miss. LEXIS 437 (Miss. 1989).

Concurrent sentences for separate convictions meet the requirements of the habitual offender statute as "separate terms served." Magee v. State, 542 So. 2d 228, 1989 Miss. LEXIS 179 (Miss. 1989).

Robbery is a crime of violence within the meaning of the habitual offender statute. Magee v. State, 542 So. 2d 228, 1989 Miss. LEXIS 179 (Miss. 1989).

The crime of attempted robbery is a crime of violence within the meaning of this section. Ashley v. State, 538 So. 2d 1181, 1989 Miss. LEXIS 24 (Miss. 1989).

The admission of evidence of a third conviction at a sentencing hearing in addition to those set out in the indictment was harmless error since, under the habitual offender statute (this section), proof of 2 convictions is sufficient to imprison a defendant for life, and the trial judge has no discretion in the sentencing phase. Jimpson v. State, 532 So. 2d 985, 1988 Miss. LEXIS 428 (Miss. 1988).

Serving one year or more on concurrent sentences for separate convictions amounts to serving more than one year on each sentence for purposes of the habitual offender statute (this section), which provides for sentencing of a recidivist "who shall have been sentenced and served separate terms of one (1) year or more." King v. State, 527 So. 2d 641, 1988 Miss. LEXIS 240 (Miss. 1988).

Armed robbery is a crime of violence, per se, for purposes of sentencing as an habitual offender under this section. King v. State, 527 So. 2d 641, 1988 Miss. LEXIS 240 (Miss. 1988).

Time served in a local or county jail is the equivalent of time spent in a state or federal penal institution under the habitual offender statute (this section), which sets forth sentencing for "habitual criminals" who have been sentenced to and have served separate terms of one year or more "in any state and/or federal penal institution." Huntley v. State, 524 So. 2d 572, 1988 Miss. LEXIS 192 (Miss. 1988).

Indictment of defendant as habitual offender should contain allegation that 2 separate penal terms of one year or more have actually been served. Hentz v. State, 510 So. 2d 515, 1987 Miss. LEXIS 2617 (Miss. 1987).

While it is not always necessary for the indictment to recite the statute number under which a defendant is being charged, the better practice is to include it, and this especially so in habitual offender cases where the state may proceed under one of 2 statutes. Martin v. State, 501 So. 2d 1124, 1987 Miss. LEXIS 2285 (Miss. 1987).

In absence of legislative standard for determining "crime of violence," a separate standard of determining violence applies when the victim is a child, and, thus, one of the 2 prior offenses of defendant, assault with attempt to commit sodomy, was a crime that was violent per se, and defendant was subject to sentencing as a habitual offender. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

The term "violent crime" or "crime of violence" need not be explicitly set out in a indictment under this section, so long as one of the prior offenses named therein is recognized as a violent crime. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

Phrase "crime of violence" is not unconstitutionally vague as applied in habitual offender prosecution of defendant who has previously been convicted of rape. McQueen v. State, 473 So. 2d 971, 1985 Miss. LEXIS 2188 (Miss. 1985).

The statute contemplates that the trial court without a jury should hear evidence and make a determination of whether the defendant has been previously convicted under the statute, with the burden resting upon the state to prove the previous convictions beyond a reasonable doubt; however, it is not necessary that the issue of prior convictions be submitted to a jury. Wilson v. State, 395 So. 2d 957, 1981 Miss. LEXIS 1945 (Miss. 1981).

2. Double jeopardy.

The prohibition against double jeopardy did not preclude the State at resentencing from enhancing a defendant's life sentence for murder with the habitual offender statute where the defendant was initially sentenced to death and therefore his status as an habitual offender was not determined until after the sentencing trial on remand; since the defendant's status as an habitual offender had not previously been determined, the finding of habitual offender status on resentencing was not barred by double jeopardy. Gray v. State, 605 So. 2d 791, 1992 Miss. LEXIS 481 (Miss. 1992).

A habitual offender's sentencing hearing, as a trial on the sentence, constitutes jeopardy for the purpose of the constitutional right against double jeopardy. Ellis v. State, 520 So. 2d 495, 1988 Miss. LEXIS 153 (Miss. 1988).

Neither § 99-19-81 nor this section violates constitutional prohibition against double jeopardy. Perkins v. Cabana, 794 F.2d 168, 1986 U.S. App. LEXIS 27510 (5th Cir. Miss.), cert. denied, 479 U.S. 936, 107 S. Ct. 414, 93 L. Ed. 2d 366, 1986 U.S. LEXIS 4575 (U.S. 1986).

3. Ex post facto.

Defendant's habitual-offender sentence was proper because (1) defendant's sentence for a prior burglary committed before burglary was determined to be a crime of violence was not enhanced, as only defendant's sentence for a current crime was increased, and (2) sufficient testimony established defendant had previously served more than one year in prison. Moffite v. State, — So. 3d —, 2019 Miss. App. LEXIS 581 (Miss. Ct. App. Dec. 3, 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 423 (Miss. 2020).

Defendant's enhanced sentence as a violent habitual offender based, in part, on a statute classifying defendant's prior burglary of a dwelling conviction as a violent crime that was enacted after defendant committed that crime, was not an ex post facto violation because the sentence was imposed for defendant's latest crime, which was aggravated due to being repetitive. Miller v. State, 225 So. 3d 12, 2017 Miss. App. LEXIS 246 (Miss. Ct. App. 2017).

4. Sentencing trial or hearing, generally.

Defendant's sentence to life without parole for aggravated domestic violence was not unfairly imposed because his previous convictions made him applicable for habitual-offender status; and there was no evidence in the record that defendant was in any way punished for rejecting a plea deal. Brown v. State, 285 So. 3d 671, 2019 Miss. App. LEXIS 263 (Miss. Ct. App.), cert. denied, 284 So. 3d 753, 2019 Miss. LEXIS 438 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 483 (Miss. 2019).

State established defendant's habitual-offender status because an employee of the Arkansas Department of Corrections testified that defendant had been convicted of aggravated assault, a felony and a crime of violence, and an employee of the Mississippi Department of Corrections testified that defendant had been was convicted of uttering a forgery, a felony. Goldsmith v. State, 195 So. 3d 207, 2016 Miss. App. LEXIS 303 (Miss. Ct. App.), cert. dismissed, 203 So. 3d 600, 2016 Miss. LEXIS 412 (Miss. 2016).

State produced sufficient evidence to support defendant's habitual-offender status because it introduced evidence of defendant's prior convictions without objection. Logan v. State, 192 So. 3d 1012, 2015 Miss. App. LEXIS 429 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1267, 2016 Miss. LEXIS 238 (Miss. 2016).

Supreme court declined to find that the admission of an affidavit during defendant's habitual offender hearing was plain error because the Confrontation Clause did not apply to sentencing proceedings, and defendant did not raise the issue on appeal. Conner v. State, 138 So. 3d 143, 2014 Miss. LEXIS 246 (Miss. 2014).

State did not fail to prove defendant's habitual-offender status beyond a reasonable doubt because pen packs establishing defendant's status as a habitual offender were admitted at the sentencing hearing; the trial court expressly incorporated the pen packs into the record of the sentencing hearing and gave defendant an opportunity to object, but he made no objection to the incorporation of the pen packs by reference. Conner v. State, 138 So. 3d 143, 2014 Miss. LEXIS 246 (Miss. 2014).

Prior convictions were a recognized exception to the requirement of a jury determination of enhancing sentencing factors, and accordingly it was not necessary that a jury determine whether the inmate qualified for enhanced sentencing as a habitual offender under Miss. Code Ann. § 99-19-83; thus, the trial court did not err when it did not empanel a jury for that purpose. Issac v. State, 968 So. 2d 951, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. 2007).

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual offender statute, Miss. Code Ann. § 99-19-83(3). Jones v. State, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

Admission of evidence in habitual offender capital murder case that defendant's habitual offender status makes him ineligible for parole is founded upon theory that Eighth and Fourteenth Amendments require that sentencer not be precluded from considering, as mitigating factors, aspects of defendant's character or record proffered as a basis for sentence less than death. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

When habitual offender status is alleged and the accused goes to trial, the trial court must hold a separate hearing without a jury to determine whether habitual offender status should be imposed. Nathan v. State, 552 So. 2d 99, 1989 Miss. LEXIS 470 (Miss. 1989).

An accused has no constitutional right to a trial by jury on the question of whether he or she is a habitual offender. All that is required is that the accused be properly indicted as a habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof. Keyes v. State, 549 So. 2d 949, 1989 Miss. LEXIS 437 (Miss. 1989).

While the defendant has a right to be heard at the bifurcated hearing required under the recidivist statutes, where he takes the stand and admits the prior convictions, which are valid on their face, he will not then be heard to challenge the constitutionality of his prior convictions. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

At the bifurcated hearing required under the recidivist statutes, the state must prove, beyond a reasonable doubt, that the defendant meets the requirements for sentencing as a habitual offender. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

In sentencing phase of capital murder case in which defendant has also been charged as habitual offender, trial judge properly prohibits defense counsel from presenting testimony speculatively as to whether defendant could be sentenced, as recidivist, to life without parole. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

5. —When held.

A trial court's failure to hold a capital murder defendant's habitual offender status hearing prior to the sentencing phase of the trial did not warrant vacation of the defendant's life sentence, which was to be served without eligibility for parole by virtue of the defendant's habitual offender status, and remand for a new jury imposition of a life sentence with the possibility of parole, since the jury did not impose the death sentence on the defendant but instead sentenced him to life without parole. Gray v. State, 605 So. 2d 791, 1992 Miss. LEXIS 481 (Miss. 1992).

6. Indictment.

State's evidence supported defendant's charge as a habitual offender under Miss. Code Ann. § 99-19-83 because both of his previous felonies were for manslaughter and aggravated assault, which were crimes of violence; the State charged defendant as a habitual offender under § 99-19-83, and Miss. Code Ann. § 99-19-81 was clearly listed as an alternative. Johnson v. State, 50 So. 3d 335, 2010 Miss. App. LEXIS 274 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011).

Defendant's convictions for conspiracy, burglary of a building other than a dwelling, attempted grand larceny, and attempted aggravated assault were appropriate because the trial court correctly held that a motion to amend the indictment to include habitual-offender language was one of form and not substance, and an indictment could be amended on the morning of trial to make that type of change. Commodore v. State, 994 So. 2d 864, 2008 Miss. App. LEXIS 658 (Miss. Ct. App. 2008).

There was no merit to appellant's argument that an indictment was improperly amended and that he was never formally indicted as an habitual offender under Miss. Code Ann. § 99-19-81 because there was no evidence of surprise, under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, because (1) a trial court entered an order amending the indictment to charge appellant as an habitual offender under Miss. Code Ann. § 99-19-83; (2) at the sentencing hearing, appellee State agreed to reduce § 99-19-83 habitual to Miss. Code Ann. § 99-19-81 habitual; and (3) appellant had been notified of the motion to amend the indictment early in the proceedings against him to charge him as a Miss. Code Ann. § 99-19-83 habitual offender. Sowell v. State, 970 So. 2d 752, 2007 Miss. App. LEXIS 820 (Miss. Ct. App. 2007).

Record showed that well before defendant's August 2005 trial he was served with notice of the state's motion to amend the indictment to charge him as a habitual offender under Miss. Code Ann. § 99-19-83; there was no indication in the record that defendant was unfairly surprised or prejudiced by the amendment, and therefore defendant did not show error in amending the indictment pursuant to Miss. Unif. Cir. & Cty. R. 7.09. Evans v. State, 957 So. 2d 430, 2007 Miss. App. LEXIS 375 (Miss. Ct. App. 2007).

Amendment of an indictment on the day of trial to charge defendant as a habitual offender was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 and Miss. Code Ann. § 99-19-83 because defense counsel had notice of the state's intentions, and defendant was given additional time to consult with his attorney about a plea agreement. Jackson v. State, 943 So. 2d 746, 2006 Miss. App. LEXIS 892 (Miss. Ct. App. 2006).

It was permissible to amend the indictment on the date of trial and to charge defendant as a habitual criminal under Miss. Code Ann. § 99-19-83, because defendant was clearly aware of the State's intention to amend the indictment and of the penalty which the amendment would carry, and because his defense was not prejudiced by the amendment. Forkner v. State, 902 So. 2d 615, 2004 Miss. App. LEXIS 1105 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 345 (Miss. 2005).

An indictment is not required to specifically state that the state will seek a life sentence without benefit of parole; an allegation that the defendant is a habitual criminal pursuant to this section is sufficient. Ficklin v. State, 758 So. 2d 457, 2000 Miss. App. LEXIS 133 (Miss. Ct. App. 2000).

An amendment of an indictment which charged the defendant as a habitual offender under § 99-19-81 rather than this section, which imposes a greater sentence than does § 99-19-81, was an amendment of form rather than substance and was, therefore, permissible since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Nathan v. State, 552 So. 2d 99, 1989 Miss. LEXIS 470 (Miss. 1989).

Indictment, to be valid under this section, must inform the defendant that the state is seeking to impose a life sentence without eligibility for parole or probation. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

An indictment which specified the principal charge against the defendant, a violation of § 97-5-23, and went on to cite with specificity the other 2 previous convictions against him, without ever informing him that the state sought to sentence him as a habitual offender under this section, was inadequate, but the inadequacy of the indictment did not require reversal where the defendant had notice of the habitual offender charge, because his attorney had gleaned from the indictment that defendant was charged under this section. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

Indictment charging defendant as habitual criminal under § 99-19-81 may be amended on date of trial, over objection of defendant, to charge indictment under this section where defense counsel has previously been advised that state intends to proceed under this section and defendant is fully aware during plea negotiations that state is taking this position; if defendant does not ask for continuance on basis of amendment, defendant may not later object on basis of surprise and prejudice in defense. Ellis v. State, 469 So. 2d 1256, 1985 Miss. LEXIS 2100 (Miss. 1985).

An indictment which set forth substantive crime and the habitual criminal requirements in clear and unambiguous language was sufficient to apprise defendant that the state was seeking to impose a life sentence without eligibility for parole or probation, even though it did not include the habitual offender section number; moreover, the trial court conducted a proper sentencing hearing pursuant to this section, prior to imposing sentence on defendant, where, after return of the jury verdict, the district attorney introduced evidence of certified copies of the previous convictions, the trial judge thereupon specifically asked defendant's attorney if he had anything to say, the attorney responded in the negative, the court then inquired of defendant whether he had anything to say, and he stated that he did not, and no additional hearing was requested, in that these actions constituted at the least a waiver of defendant's right to proceed and introduce evidence on his behalf in the sentencing phase. Dalgo v. State, 435 So. 2d 628, 1983 Miss. LEXIS 2564 (Miss. 1983).

No reversible error was committed by the trial court in permitting the state to amend an indictment prior to starting the sentencing hearing after the jury's verdict of guilty where the indictment had erroneously set forth the dates of the defendant's two prior convictions in North Carolina and where no prejudice to the defendant resulted from the amendment. McLamb v. State, 410 So. 2d 1318, 1982 Miss. LEXIS 1880 (Miss. 1982).

The effect of double enhancement where the crime of carrying a concealed weapon after conviction of a felony is combined with sentencing under the habitual offenders statute does not render the latter statute unconstitutional. Failure of the state to specify in an indictment which section of the habitual criminal statute, § 99-19-81 or this section, applies to a defendant is not error since the statutes are not criminal offenses and only affect sentencing. Osborne v. State, 404 So. 2d 545, 1981 Miss. LEXIS 2219 (Miss. 1981).

In a prosecution for burglary as an habitual offender, the indictment properly complied with the statute where it alleged with particularity the nature and description of the offenses constituting the previous felonies committed by the defendant, and listed the state jurisdictions of the previous convictions and the dates of those judgments. The defendant was not entitled to a jury trial on the issue of his previous felonies; nor does the statute constitute cruel and unusual punishment. Diddlemeyer v. State, 398 So. 2d 1343, 1981 Miss. LEXIS 2023 (Miss. 1981).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under this section, the defendant's demand for a special venire under § 13-5-77 and for 12 peremptory challenges under § 99-17-3 was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; this section does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March 14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. Yates v. State, 396 So. 2d 629, 1981 Miss. LEXIS 1992 (Miss. 1981).

7. — Indictment, amendment of.

Defendant's conviction for capital murder was reversed because the trial court erred in amending defendant's indictment to charge him as a violent habitual offender because the State presented no evidence supporting its allegation that one of defendant's prior burglaries actually involved violence; and the State did not allege with particularity the nature or description of the offense constituting the previous convictions and did not afford defendant a fair opportunity to present a defense to the habitual-offender charge. Burleson v. State, 166 So. 3d 499, 2015 Miss. LEXIS 243 (Miss. 2015).

Defendant's enhanced sentence as a habitual offender under Miss. Code Ann. § 99-19-83 was vacated as allowing the State to amend the indictment to allege that he was a habitual offender after his trial and conviction but before his sentencing amounted to an unfair surprise under Miss. Unif. Cir. & Cty. R. 7.09. Gowdy v. State, 56 So. 3d 540, 2010 Miss. LEXIS 656 (Miss. 2010).

8. Right to speedy trial.

A defendant's right to a speedy trial was not violated, even though 6 years elapsed between the date of indictment and the actual determination of the defendant's habitual offender status, since habitual offender status is not a crime in and of itself, but is merely a status which enhances the sentence imposed for the conviction of an offense, and, therefore, the determination of habitual offender status is not an "offense" to which the right to a speedy trial would apply. Gray v. State, 605 So. 2d 791, 1992 Miss. LEXIS 481 (Miss. 1992).

9. Constitutionality.

Circuit court properly denied defendant's motion for a judgment notwithstanding the verdict or, in the alternative, a new trial because there was sufficient circumstantial evidence to convict him of murder, the guilty verdict was not so contrary to the evidence so as to constitute an unconscionable injustice, the State proved corpus delicti, and defendant's sentence as a habitual offender did not violate the holdings in Apprendi and Blakely. Collins v. State, — So. 3d —, 2017 Miss. App. LEXIS 635 (Miss. Ct. App. Nov. 7, 2017), cert. denied, 250 So. 3d 1267, 2018 Miss. LEXIS 328 (Miss. 2018).

In a grand larceny case, defendant's argument that his sentence of life without parole as a habitual offender was disproportionate to the crime and constituted cruel and unusual punishment was rejected because the sentence conformed to the requirements of the habitual-offender statute. Defendant was convicted of forgery in 2010, aggravated assault in 1997, and grand larceny on December 13, 2014; aggravated assault was a crime of violence within the meaning of the habitual-offender statute. Goldsmith v. State, — So. 3d —, 2016 Miss. App. LEXIS 2 (Miss. Ct. App. Jan. 5, 2016), op. withdrawn, sub. op., 195 So. 3d 207, 2016 Miss. App. LEXIS 303 (Miss. Ct. App. 2016).

Because the circuit court used only defendant's prior convictions to enhance the penalty of his murder conviction, and because the circuit court did not engage in additional fact-finding with respect to the crime charged, defendant's enhanced sentencing failed to violate the holdings in Apprendi and Blakely. As a result, defendant's argument that his sentence as a habitual offender was unconstitutional was meritless. Collins v. State, 172 So. 3d 813, 2014 Miss. App. LEXIS 563 (Miss. Ct. App. 2014), rev'd, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

Defendant's life sentence without the possibility of parole or probation for felony evasion under Miss. Code Ann. § 97-9-72 did not warrant an Eighth Amendment, U.S. Const. amend. VIII, analysis because: (1) the sentence was proper under the habitual offender statute, Miss. Code Ann. § 99-19-83; (2) defendant's current offenses and his prior offenses of possession of a controlled substance, attempted carjacking with a firearm, and aggravated assault with a firearm were grave; (3) there was no gross disproportionality in the sentence; and (4) the sentence fell within the statutory maximum period. Skinner v. State, 120 So. 3d 419, 2013 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 452 (Miss. 2013).

In a case in which defendant was found guilty of felony driving under the influence and was sentenced as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections, defendant unsuccessfully argued that his sentence was disproportionate to the crime and constituted cruel and unusual punishment. The indictment charging defendant as a habitual offender listed previous convictions of burglary of a dwelling, aggravated assault, and felony DUI, and during the sentencing hearing, the trial judge was notified that defendant had other convictions, including one for a jail escape and two other felony DUIs; his life sentence complied with Miss. Code. Ann. § 99-19-83, and it was not cruel and unusual punishment. Cummings v. State, 29 So. 3d 859, 2010 Miss. App. LEXIS 115 (Miss. Ct. App. 2010).

Defendant's sentence conformed to the requirements of the habitual offender statute and the circuit court considered defendant's sentence in light of the facts and her previous criminal history; accordingly, she did not receive a grossly disproportionate sentence. Brown v. State, 37 So. 3d 1205, 2009 Miss. App. LEXIS 945 (Miss. Ct. App. 2009), cert. denied, 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), cert. denied, 562 U.S. 1015, 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510 (U.S. 2010).

Because defendant's criminal history showed that he had an inability to conform his behavior to the requirements that society expected of him, life imprisonment was not constitutionally disproportionate for defendant's conviction as a habitual offender under Miss. Code Ann. § 99-19-83. Lyles v. State, 12 So. 3d 532, 2009 Miss. App. LEXIS 263 (Miss. Ct. App. 2009).

Defendant's life sentence for possession of cocaine and possession of marijuana was not cruel and unusual punishment because he met the requirements of the habitual offender statute under Miss. Code Ann. § 99-19-83 in that he was also convicted of two separate prior felonies, one of which was a violent crime, and he served more than a year for each. Jenkins v. State, 997 So. 2d 207, 2008 Miss. App. LEXIS 460 (Miss. Ct. App. 2008).

Defendant's argument that because of its prescribed sentence of life imprisonment without parole, the habitual offender statute, Miss. Code Ann. § 99-19-83, was violative of his Eighth Amendment right failed because § 99-19-83 was found not to violate one's Eighth Amendment rights and the length of sentences was properly controlled by the Legislature. Forkner v. State, 902 So. 2d 615, 2004 Miss. App. LEXIS 1105 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 345 (Miss. 2005).

Sentence of life imprisonment without parole was not unconstitutionally disproportionate for defendant sentenced as habitual offender on record of convictions for burglary, armed robbery, and prison escape, and was not cruel and unusual punishment under Eighth Amendment. Even though final conviction was for auto burglary, a concededly less offense than earlier offenses, earlier record was of convictions for armed robbery, burglary, escape, and armed robbery, at least two of which were crimes of violence per se. McGruder v. Puckett, 954 F.2d 313, 1992 U.S. App. LEXIS 2655 (5th Cir. Miss.), cert. denied, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98, 1992 U.S. LEXIS 5084 (U.S. 1992).

A defendant's life imprisonment under the recidivist statute, this section, after he shoplifted and ate 2 cans of sardines in a store, and then attempted to steal the money to pay for them by breaking into a house, was unduly harsh under an Eighth Amendment cruel and unusual punishment analysis. Ashley v. State, 538 So. 2d 1181, 1989 Miss. LEXIS 24 (Miss. 1989).

The application of § 99-19-81 to recidivist murderers, rapists and kidnappers does not violate the Fourteenth Amendment of the United States Constitution even though under the habitual offender statutes, this section and § 99-19-81, taken together, only those convicted of murder, rape or kidnapping can be sentenced to life without parole without proof of a prior conviction of a crime of violence. Sutherland v. State, 537 So. 2d 1360, 1989 Miss. LEXIS 23 (Miss. 1989).

Imposition of a life sentence in prison without parole or probation imposed upon defendant who was convicted of child fondling, and who had 2 prior convictions-one for assault with intent to commit sodomy and the other for indecency with a child-did not constitute cruel and unusual punishment. Bandy v. State, 495 So. 2d 486, 1986 Miss. LEXIS 2654 (Miss. 1986).

10. Appeals by State.

There was no statutory authority for an

appeal by the State from a circuit court based upon the circuit judge's failure to sentence a defendant to life without parole following his conviction of burglary and proof that he was an habitual offender under this section, and therefore the appeal would be dismissed for lack of jurisdiction. State v. Lee, 602 So. 2d 833, 1992 Miss. LEXIS 352 (Miss. 1992).

11. Habitual offender portion of indictment.

Inmate should not have been sentenced as a habitual offender because the indictment lacked the statutory section number and omitted any charge of the inmate as a habitual offender or any indication that the State was seeking a sentence enhancement. Gray v. State, — So. 3d —, 2018 Miss. LEXIS 493 (Miss. Dec. 5, 2018).

Trial court properly sentenced appellant as a habitual offender. It appeared that the trial court, after reviewing the evidence of appellant's prior convictions and sentences provided by the State, interpreted the documents to reflect that appellant served 12 months on an unlawful-restraint conviction while he was serving a 30-year sentence for murder, and sufficient evidence supported the trial court's order granting the State's motion to amend appellant's indictment. Adele v. State, 218 So. 3d 261, 2017 Miss. App. LEXIS 113 (Miss. Ct. App. 2017).

Defendant's indictment contained the necessary information to support his status as a habitual offender because it that, in Kentucky, defendant had been convicted of felony fleeing and robbery and served his sentence; based upon the attached documents and the order granting the State's motion to amend, defendant had sufficient notice of the convictions the State was relying on and an opportunity to challenge the convictions, but he did not do so. Logan v. State, 192 So. 3d 1012, 2015 Miss. App. LEXIS 429 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1267, 2016 Miss. LEXIS 238 (Miss. 2016).

Defendant was properly sentenced as a habitual offender because the State provided evidence to the circuit judge that defendant had two prior felonies arising from separate incidents for which he served a year or more in the custody of the Mississippi Department of Corrections, and one of the felonies was a crime of violence. McKnight v. State, 187 So. 3d 635, 2015 Miss. App. LEXIS 276 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 142 (Miss. 2016).

Conviction that the State relied upon to prove defendant's habitual-offender status was proper because the revocation of defendant's post-release supervision for his failure-to-register-as-a-sex-offender conviction was timely, and the subsequent one year defendant served for the second revocation was also valid; since both revocations were timely, the time served was valid. Brown v. State, 119 So. 3d 1079, 2013 Miss. App. LEXIS 131 (Miss. Ct. App. 2013).

Amendment of an indictment to charge a defendant as a habitual offender under Miss. Code Ann. § 99-19-81, rather than Miss. Code Ann. § 99-19-83 (which would have imposed a greater sentence), was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Smith v. State, 965 So. 2d 732, 2007 Miss. App. LEXIS 579 (Miss. Ct. App. 2007).

Where the prosecution stated that if the inmate refused its latest plea deal it would amend the indictment to allege that he was a habitual offender under Miss. Code Ann. § 99-19-83, the inmate did not take the plea offer, and the prosecution then filed the motion to amend the indictment; thus, the inmate was clearly aware of the habitual offender allegation prior to his guilty plea not only to aggravated assault, but also to his habitual offender status. Issac v. State, 968 So. 2d 951, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. 2007).

Defendant's sentence of life in prison without the possibility of parole after he was convicted of grand larceny did not violate the Eighth Amendment to the U.S. Constitution where he was sentenced within the mandatory statutory limits set out in Miss. Code Ann. § 99-19-83 for habitual offenders; his sentence was not grossly disproportionate. Kelly v. State, 947 So. 2d 1002, 2006 Miss. App. LEXIS 571 (Miss. Ct. App. 2006), cert. denied,

947 So. 2d 960, 2007 Miss. LEXIS 89 (Miss. 2007).

Defendant charged with robbery had been convicted previously for grand larceny and bank robbery; the trial court did not err in amending the indictment to charge defendant as a habitual offender under Miss. Code Ann. § 99-19-83, and defendant was sentenced to a term of life without parole. Wilson v. State, 935 So. 2d 945, 2006 Miss. LEXIS 303 (Miss. 2006), cert. denied, 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088 (U.S. 2007).

Defendant was properly sentenced as a habitual offender because a previous manslaughter conviction was considered a crime of violence for purposes of Miss. Code Ann. § 99-19-83. Koger v. State, 919 So. 2d 1058, 2005 Miss. App. LEXIS 455 (Miss. Ct. App. 2005).

Defendant failed to preserve his claim that the trial court had erred in failing to quash the habitual offender portion of the indictment because it was missing the concluding language required by Miss. Const. Art. VI, § 169, that stated "against the peace and dignity of the state." Jones v. State, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

Where the record indicated that both defendants had been convicted twice previously of felonies, at least one of which had been a crime of violence, and such proof, in permissible form, was adduced at trial, the trial court did not err in sentencing defendants as habitual offenders. Harper v. State, 887 So. 2d 817, 2004 Miss. App. LEXIS 596 (Miss. Ct. App. 2004).

The habitual offender portion of an indictment which was returned under this section was faulty in that it did not give the date of the judgment for a prior conviction and, therefore, the conviction should not have been allowed to be used in the habitual sentencing portion of the trial. Ormond v. State, 599 So. 2d 951, 1992 Miss. LEXIS 153 (Miss. 1992).

12. Proof of prior conviction; in Mississippi.

There was insufficient evidence to demonstrate that defendant was a habitual offender under Miss. Code Ann. § 99-19-83 because there was no proof submitted as to whether he served one year or more on the Mississippi convictions; the Mississippi Department of Corrections records did not state or reflect that defendant had served one year or more on a violent-felony conviction. Due to double jeopardy, the State could not retry under Miss. Code Ann. § 99-19-83; however, there was sufficient proof to sentence defendant under the enhancement provided by Miss. Code Ann. § 99-19-81. Brown v. State, 217 So. 3d 805, 2017 Miss. App. LEXIS 110 (Miss. Ct. App. 2017).

Defendant's sentence of life imprisonment without parole as a habitual offender was appropriate because the State of Mississippi presented evidence showing that defendant was sentenced to and served terms of one year or more in a state penal institution on at least two of the three felony convictions, and at least one of these felonies was a crime of violence. Bunch v. State, 123 So. 3d 484, 2013 Miss. App. LEXIS 602 (Miss. Ct. App. 2013).

State inmate convicted of third-offense felony shoplifting under Miss. Code Ann. § 97-23-93(6) and sentenced to life in prison without the possibility of parole was granted habeas corpus under 28 U.S.C.S. § 2254 based on a fundamental miscarriage of justice because the facts presented at sentencing did not establish that the inmate had actually served one year in prison for a prior felony conviction, an essential element to prove habitual offender status under Miss. Code Ann. § 99-19-83. Sumrell v. Mississippi, 607 F. Supp. 2d 748, 2009 U.S. Dist. LEXIS 30798 (N.D. Miss. 2009), op. withdrawn, 2009 U.S. Dist. LEXIS 39162 (N.D. Miss. May 8, 2009).

In a drug case, defendant was properly sentenced as a habitual offender because, regardless of whether the crimes of simple assault on a police officer and possession of methamphetamine arose from different circumstances, there was evidence that defendant served at least one year for each of two prior felonies. A department of corrections custodian of records testified that defendant served at least one year for a forgery conviction and that he served at least one year under both his two-year sentence for simple assault on a police officer and his three-year sentence for possession of methamphetamine. Vardaman v. State, 966 So. 2d 885, 2007 Miss. App. LEXIS 706 (Miss. Ct. App. 2007).

State sufficiently established that defendant had previously served two separate terms of one year or more in state or federal penal institution, as would bring defendant within scope of habitual offender sentencing statute, where defendant's parole officer testified that defendant had been incarcerated for over a year for assault of police officer and that defendant had been incarcerated for over a year for separate grand larceny conviction. Davis v. State, 680 So. 2d 848, 1996 Miss. LEXIS 495 (Miss. 1996).

At bifurcated hearing, as required under recidivist statutes, state must prove requirements set forth in habitual offender statute beyond reasonable doubt. Davis v. State, 680 So. 2d 848, 1996 Miss. LEXIS 495 (Miss. 1996).

The State would not be permitted a second chance to prove the habitual offender status of a defendant where the habitual offender portion of the sentence had been vacated due to the insufficiency of the evidence presented to prove the necessary prior convictions; Article 3, § 22 of the Mississippi Constitution would bar the State from perfecting its evidence through successive attempts. Cox v. State, 586 So. 2d 761, 1991 Miss. LEXIS 588 (Miss. 1991).

Certified copies of a defendant's commitment papers were competent evidence of previous convictions for purposes of proving that the defendant was a habitual offender under this section. Estelle v. State, 558 So. 2d 843, 1990 Miss. LEXIS 153 (Miss. 1990).

In felony cases where a prisoner is transferred to the penitentiary, the original commitment papers showing conviction of a felony duly issued by a circuit clerk pursuant to § 99-19-45 may be introduced in evidence as proof of such conviction; the absence of a limit on consideration of remote convictions in the sentencing of habitual criminals does not rise to the level of cruel and unusual punishment. Pace v. State, 407 So. 2d 530, 1981 Miss. LEXIS 2293 (Miss. 1981), overruled in part, Hopson v. State, 625 So. 2d 395, 1993 Miss. LEXIS 422 (Miss. 1993).

13. —Out of state.

Plain language of the statute does not require that the prior convictions must also be felonies in Mississippi; rather, they must be felonies in the state where the conviction occurred. Logan v. State, 192 So. 3d 1012, 2015 Miss. App. LEXIS 429 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1267, 2016 Miss. LEXIS 238 (Miss. 2016).

Defendant was properly sentenced as a habitual offender because his Kentucky conviction and sentence for felony fleeing, coupled with a prior conviction and sentence of more than one year for robbery, also in Kentucky, were sufficient to support his habitual-offender status. Logan v. State, 192 So. 3d 1012, 2015 Miss. App. LEXIS 429 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1267, 2016 Miss. LEXIS 238 (Miss. 2016).

Defendant's life sentence without eligibility for parole or probation for felony evasion under Miss. Code Ann. § 97-9-72 as a habitual offender under Miss. Code Ann. § 99-19-83 was proper since: (1) defendant served at least a year or more in a penal institution for each underlying conviction; (2) the prior offenses of armed carjacking and aggravated assault constituted felonies under Florida law; (3) the offenses were crimes of violence; and (4) § 99-19-83 did not require that the underlying felony convictions be committed at any certain age. Skinner v. State, 120 So. 3d 419, 2013 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 452 (Miss. 2013).

Defendant's conviction as a habitual offender under Miss. Code Ann. § 99-19-83 was supported by commitment papers from another state that established defendant previously had been convicted of three felonies, at least one of which was a crime of violence. Long v. State, 52 So. 3d 1188, 2011 Miss. LEXIS 41 (Miss. 2011).

Although the record was insufficient to sentence defendant, who was convicted of murder, as a habitual offender under Miss. Code Ann. § 99-19-83, since the record did not show that defendant had served two separate terms of at least one year in a state or federal penal institution, the error was harmless, because there was sufficient evidence to sentence defendant as a habitual offender under Miss. Code Ann. § 99-19-81, and the resulting sentence was the same under either provision. Reed v. State, 31 So. 3d 48, 2009 Miss. App. LEXIS 611 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

Out-of-state exhibits were not admissible evidence of a prior conviction for the purpose of sentencing the defendant as a habitual offender under this section, where the exhibits consisted of a letter from a correction records supervisor and police records detailing a prior arrest and conviction which were only notarized and were therefore not properly certified, and file copies from the Florida Department of Corrections which were copies of copies rather than certified copies of a public record. Cox v. State, 586 So. 2d 761, 1991 Miss. LEXIS 588 (Miss. 1991).

14. Jury instructions.

At sentencing phase in capital murder case, jury is entitled to know by instruction whether defendant is eligible for parole, as that information is nonspeculative and provides jurors with relevant information to determine defendant's fate. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in denying the defendant's instruction which detailed the effect of his habitual offender indictment. The defendant had a right to have the jury told that his prior convictions and sentences would be considered to enhance the punishment if given a life sentence, and to have the jury informed that this enhancement meant life without parole. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

In a prosecution for aggravated assault on an indictment charging defendant with being a habitual criminal, the trial court's failure to give a limiting instruction on its own motion informing the jury not to consider defendant's prior convictions as evidence of the assault charges did not deny him due process of law, where defendant had testified freely as to the offenses made part of the indictment and where no limiting instruction was requested by defendant's counsel; under the totality of the circumstances, such an instruction was not constitutionally required. Nettles v. State, 380 So. 2d 246, 1980 Miss. LEXIS 1861 (Miss. 1980).

15. Validity of guilty plea.

Where defendant was convicted of grand larceny and had prior convictions for attempted rape and manslaughter, defendant's sentence of life imprisonment without the possibility of parole was not grossly disproportionate. Moreover, the documents offered by the State regarding said prior convictions did only refer to defendant's first and last name, but in testimony a parole officer and the State referred to defendant with all three names; the record did not reflect that defendant objected and no error, if any, was preserved or appeal. Clay v. State, 881 So. 2d 354, 2004 Miss. App. LEXIS 852 (Miss. Ct. App. 2004).

A defendant's argument that his previous guilty pleas did not "on their face show that they were knowing and voluntary," as required for purposes of proving that the defendant was a habitual offender, was without merit where the defendant did not dispute the prior convictions as having been given involuntarily even though the lower court specifically asked him whether he wished to do so; the burden was on the defendant to introduce evidence to make a prima facie case showing that his guilty pleas were constitutionally invalid. Estelle v. State, 558 So. 2d 843, 1990 Miss. LEXIS 153 (Miss. 1990).

16. Particular circumstances.

State presented evidence showing that defendant was sentenced to and served terms of one year or more in a state penal institution for two prior felony convictions, and that his prior aggravated assault conviction was a crime of violence; thus, defendant met the requirements to be sentenced as a habitual offender to life imprisonment without parole. Williams v. State, 269 So. 3d 192, 2018 Miss. App.

LEXIS 39 (Miss. Ct. App.), cert. denied, 258 So. 3d 287, 2018 Miss. LEXIS 525 (Miss. 2018).

In a case in which a jury convicted defendant of possession of a weapon by a convicted felon, defendant's habitual offender sentence was valid and constitutional. The State was not required to prove defendant's prior convictions to a jury. Collins v. State, 232 So. 3d 739, 2017 Miss. App. LEXIS 297 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 525 (Miss. 2017), cert. denied, 229 So. 3d 123, 2017 Miss. LEXIS 493 (Miss. 2017).

Defendant was properly sentenced as a violent habitual offender because, before defendant committed defendant's latest crime, defendant's prior conviction for burglary of a dwelling was classified as a crime of violence. Miller v. State, 225 So. 3d 12, 2017 Miss. App. LEXIS 246 (Miss. Ct. App. 2017).

State's proof was sufficient to show that defendant served more than one year, approximately 14 months, on both his conviction for receiving stolen property and his conviction for possession of a firearm by a felon; the trial court did not err in sentencing defendant as a habitual offender. Charleston v. State, 205 So. 3d 1141, 2016 Miss. App. LEXIS 223 (Miss. Ct. App.), cert. denied, 205 So. 3d 1086, 2016 Miss. LEXIS 539 (Miss. 2016).

After defendant was convicted, an amended sentencing order was issued, sentencing defendant to the maximum sentence as a habitual offender because defendant's two prior felonies of burglary of a dwelling and possession of a firearm by a convicted felon did not meet the requirements for the violent-habitual-offender statute. Harris v. State, 188 So. 3d 601, 2016 Miss. App. LEXIS 165 (Miss. Ct. App. 2016).

Because defendant's sentence of thirty years without parole for the offense of kidnapping was within the statutory limits, it was not contrary to the law. Although defendant could have received a life sentence under the kidnapping statute, the State of Mississippi did not seek a life sentence, and defendant's sentence was subject to enhancement because the victim was older than sixty-five, defendant used a gun, and defendant was a habitual offender. Burrell v. State, 183 So. 3d 19, 2015 Miss. LEXIS 531 (Miss. 2015).

Defendant was properly sentenced to life because the State presented evidence that he had two previous felony convictions, one of which was a crime of violence, that he was sentenced to more than one year for each crime, and that he served more than one year of the sentence for each conviction. Pryor v. State, 148 So. 3d 381, 2014 Miss. App. LEXIS 143 (Miss. Ct. App. 2014), cert. denied, 154 So. 3d 33, 2015 Miss. LEXIS 49 (Miss. 2015).

In sentencing defendant as a habitual offender, the trial court properly considered his conviction of robbery in Tennessee, as Tenn. Code Ann. § 39-13-401 defines robbery as the intentional or knowing theft of property from the person of another by violence or putting the person in fear, and thus is a violent crime for purposes of the requirements of Miss. Code Ann. 99-19-83. Conner v. State, 138 So. 3d 158, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. 2013), aff'd, 138 So. 3d 143, 2014 Miss. LEXIS 246 (Miss. 2014).

Pen pack indicating that defendant had been convicted of robbery and had pled guilty to armed robbery with a deadly weapon, both felonies, and which had separate victims and occurred at separate times, was sufficient evidence to prove his status as a habitual offender. Conner v. State, 138 So. 3d 158, 2013 Miss. App. LEXIS 226 (Miss. Ct. App. 2013), aff'd, 138 So. 3d 143, 2014 Miss. LEXIS 246 (Miss. 2014).

Circuit court did not abuse its discretion in finding that defendant's sentence was not grossly disproportionate to the crimes he committed because defendant received a life sentence for each of his convictions in compliance with Miss. Code Ann. § 99-19-83; since the circuit court found no inference of gross disproportionality in defendant's sentence, it was not required to apply the three-prong proportionality balancing test. Wilson v. State, 106 So. 3d 853, 2013 Miss. App. LEXIS 15 (Miss. Ct. App. 2013).

State provided sufficient evidence showing no error by the circuit court in sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-83 because defendant had been convicted twice previously of felony crimes separately brought and arising out of separate incidents at different times, he had been sentenced to and served separate terms of one year or more in the custody of the Tennessee Department of Corrections, and one or more of those felonies constituted a crime of violence, pursuant to § 99-19-83. Wilson v. State, 106 So. 3d 853, 2013 Miss. App. LEXIS 15 (Miss. Ct. App. 2013).

Defendant was improperly sentenced as a habitual offender under Miss. Code Ann. § 99-19-83 because burglary of a dwelling was not a per se "crime of violence" under § 99-19-83. Kee Brown v. State, 102 So. 3d 1087, 2012 Miss. LEXIS 610 (Miss. 2012).

In a matter of first impression, the appellate court held that defendant's conviction of burglary of a dwelling under former Miss. Code Ann. § 97-17-19 constituted a crime of violence for Miss. Code Ann. § 99-18-83 purposes as Miss. Code Ann. § 99-15-107 identified burglary of a dwelling as a crime of violence, and there was a significant prospect of violence presented by every burglary of a dwelling because a dwelling was a place of human abode. Brown v. State, 102 So. 3d 1130, 2011 Miss. App. LEXIS 361 (Miss. Ct. App. 2011).

In a case in which an inmate appealed the trial court's summary dismissal of his post-conviction relief motion, the inmate argued unsuccessfully that the State failed to prove his habitual-offender status for sentencing. The indictment delineated five previous felony offenses for which he was convicted, and having submitted a plea petition to the circuit court in which he admitted to those prior felony convictions and having then entered a valid guilty plea to the principal offense as a habitual offender, the circuit court properly sentenced the inmate as a habitual offender. Joiner v. State, 32 So. 3d 542, 2010 Miss. App. LEXIS 56 (Miss. Ct. App. 2010).

In a case in which defendant's conviction for possession of approximately 2.37 grams of cocaine was his second drug offense, pursuant to Miss. Code Ann. § 41-29-147, he was subject to twice the maximum sentence of 30 years set forth in Miss. Code Ann. § 41-29-139(b)(1), and as a habitual offender, he was also subject to an additional enhanced penalty under Miss. Code Ann. § 99-19-83, which called for a mandatory life sentence, his life sentence was not disproportionate to the crime and did not constitute cruel and unusual punishment. Clay v. State, 20 So. 3d 743, 2009 Miss. App. LEXIS 696 (Miss. Ct. App. 2009).

In a case in which defendant appealed his conviction as a habitual offender for possession of approximately 2.37 grams of cocaine, in violation of Mississippi Code Ann. § 99-19-83, he argued unsuccessfully that the trial court erred in denying his motion for a new trial or, alternatively, for a judgment notwithstanding the verdict because the verdict was against the overwhelming weight of the evidence. There was sufficient evidence since: (1) the jury heard testimony from two officers that a bag of cocaine was found in the back seat of the vehicle and that defendant was the only passenger in the back seat; (2) both officers testified that defendant exhibited suspicious behavior before the stop and behaved in a nervous-like manner during the stop, unlike the other persons in the vehicle; (3) a crack pipe and a small amount of cocaine were found on defendant's person during the pat-down search; and (4) defendant gave an officer a false name. Clay v. State, 20 So. 3d 743, 2009 Miss. App. LEXIS 696 (Miss. Ct. App. 2009).

Defendant was not sentenced to life solely based on possession of marijuana. Defendant was sentenced as a habitual offender pursuant to Miss. Code Ann. § 99-19-83. Drummer v. State, 42 So. 3d 563, 2009 Miss. App. LEXIS 933 (Miss. Ct. App. 2009), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 452 (Miss. 2010).

Defendant's life sentence without parole for possession of less than 0.10 gram of cocaine in violation of Miss. Code Ann. § 41-29-139(c)(1)(A) was mandatory under the circumstances and did not arise solely from his conviction of possession of cocaine but based on his status as a habitual offender under Miss. Code Ann. § 99-19-83. Furthermore, defendant's claim was procedurally barred because he did not address all three factors of the proportionality analysis. Hudson v. State, 31 So. 3d 1, 2009 Miss. App. LEXIS 58 (Miss. Ct. App. 2009), rev'd, 30 So. 3d 1199, 2010 Miss. LEXIS 160 (Miss. 2010).

Where the trial court began to sentence the inmate to a 20-year sentence for aggravated assault, but the prosecutor notified the trial court that the inmate was being sentenced as a habitual offender pursuant to Miss. Code Ann. § 99-19-83, the trial court then read the statute and sentenced the inmate to life imprisonment; the trial court imposed a 20-year sentence, corrected itself, sentenced the inmate to life imprisonment, and then adjourned, and thus the trial court did not impermissibly impose a definite sentence and then illegally impose a greater sentence. Issac v. State, 968 So. 2d 951, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. 2007).

Trial court had not improperly determined facts giving rise to a defendant's lifetime habitual status where the post-jury verdict hearing was relegated to proof regarding prior convictions for four separate felonies to which the defendant had pled guilty. Garrison v. State, 950 So. 2d 990, 2006 Miss. LEXIS 693 (Miss. 2006).

Petitioner's third motion for post-conviction relief was properly denied where he was properly sentenced to life in prison without parole after he pled guilty to capital murder as a habitual offender under Miss. Code Ann. § 99-19-101; arguing a technical defect between the sentencing under Miss. Code Ann. § 99-19-81, as opposed to Miss. Code Ann. § 99-19-83, was of little or no effect. Clark v. State, 960 So. 2d 521, 2006 Miss. App. LEXIS 815 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 394 (Miss. 2007).

Defendant's convictions for attempting a burglary, arson, and a murder, were proper where venue was proper in the county where he attempted to burn the structure; further, his sentence as an habitual offender pursuant to Miss. Code Ann. § 99-19-83 was proper because the fact that the sentences were served concurrently for his Tennessee convictions did not erase the fact that he was given two separate sentences. Holbrook v. State, 877 So. 2d 525, 2004 Miss. App. LEXIS 23 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 865 (Miss. 2004), cert. denied, 543 U.S. 1166, 125 S. Ct. 1340, 161 L. Ed. 2d 141, 2005 U.S. LEXIS 1746 (U.S. 2005).

The defendant was properly sentenced as an habitual offender where he had been convicted previously of the crimes of possession of cocaine and aggravated assault, the charges for these two crimes were brought separately, and the defendant served separate terms of more than one year in prison for these crimes. Tran v. State, 785 So. 2d 1112, 2001 Miss. App. LEXIS 217 (Miss. Ct. App. 2001).

Defendant's time served in county jail was equivalent to time served in state penitentiary under habitual offender sentencing statute. Davis v. State, 680 So. 2d 848, 1996 Miss. LEXIS 495 (Miss. 1996).

Defendant's prior conviction for aggravated assault of law enforcement officer was conviction for "crime of violence" within meaning of habitual offender sentencing statute. Davis v. State, 680 So. 2d 848, 1996 Miss. LEXIS 495 (Miss. 1996).

A defendant's conviction for escape under § 97-9-45 constituted a "felony" and, therefore, he was properly sentenced as a habitual offender under this section. Beckham v. State, 556 So. 2d 342, 1990 Miss. LEXIS 11 (Miss. 1990).

Reindictment of defendant as habitual offender was not the result of prosecutorial vindictiveness after defendant rejected plea bargaining offer. Graves v. State, 492 So. 2d 562, 1986 Miss. LEXIS 2514 (Miss. 1986).

A defendant was entitled to have his sentence as a habitual offender under this section vacated, where the state at the trial proved that he had 2 felony convictions, but failed to prove that he had actually served one year or more on such convictions. The state's proof would only have sustained a conviction under Mississippi Code § 99-19-81. Ellis v. State, 485 So. 2d 1062, 1986 Miss. LEXIS 2757 (Miss. 1986).

Sentence of life imprisonment without parole as violent habitual offender imposed upon defendant convicted of burglary of occupied house who has previously been convicted of mayhem and manslaughter is not disproportionate to crime and does not violate Eighth Amendment to United States Constitution. Jackson v. State, 483 So. 2d 1353, 1986 Miss. LEXIS 2383 (Miss. 1986).

Convicted defendant who has been convicted twice previously of felonies which were brought and arose out of separate incidents at different times and was sentenced to and did serve one or more years on each offense, at least one of which was crime of violence, may be sentenced as violent habitual offender even though prior sentences were served consecutively without intervening period in which defendant was free of confinement. Jackson v. State, 483 So. 2d 1353, 1986 Miss. LEXIS 2383 (Miss. 1986).

Defendant who had previously been convicted of 3 separate felonies, but whose only conviction for crime of violence is one for which he is currently under sentence, is not properly subject of life sentence as habitual offender. Davis v. State, 477 So. 2d 223, 1985 Miss. LEXIS 2136 (Miss. 1985).

Sentencing convicted defendant to life imprisonment under this section is violation of due process where indictment under which defendant is convicted clearly notices defendant that state is seeking only 7-year term; this plain error is of constitutional dimensions and may be raised in postconviction proceeding notwithstanding defendant's failure to raise issue at trial or on direct appeal, and is ground for resentencing under § 99-19-81. Smith v. State, 477 So. 2d 191, 1985 Miss. LEXIS 2067 (Miss. 1985).

In order to be sentenced under this section, an individual must have committed two prior felonies, one of which was violent, and have been sentenced and served terms of at least one year on each of those prior felonies; accordingly, where a petitioner convicted of armed robbery had two prior convictions for breaking and entering and larceny, the appellate court would be compelled to grant his motion for leave to file motion to vacate habitual criminal sentence in forma pauperis. McLamb v. State, 456 So. 2d 743, 1984 Miss. LEXIS 1879 (Miss. 1984).

Although defendant, convicted of rape, was sentenced under the wrong habitual offender statute, remand for resentencing was not necessary, where the sentence imposed was in fact correct. Taylor v. State, 426 So. 2d 775, 1983 Miss. LEXIS 2328 (Miss. 1983).

In a prosecution for cattle theft in which the indictment advised the defendant that he was subject to a life imprisonment punishment as an habitual criminal under this section, the defendant's demand for a special venire under § 13-5-77 and for 12 peremptory challenges under § 99-17-3 was properly denied where, although the defendant might receive a life sentence if convicted, the underlying offense of cattle theft was not a capital crime; this section does not make it a crime for one to be a multiple offender even though it affects the severity of punishment. However, the case would be remanded for resentencing where the defendant at the time of his indictment in the present cause had not served terms of one year or more for his prior convictions dated March 14 and April 4, 1980, and subsequent to the date of the present offense before the court: September 1979. Yates v. State, 396 So. 2d 629, 1981 Miss. LEXIS 1992 (Miss. 1981).

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a prior felony did not constitute cruel and unusual punishment in violation of the United States and Mississippi Constitutions. Baker v. State, 394 So. 2d 1376, 1981 Miss. LEXIS 1960 (Miss. 1981).

In a prosecution for armed robbery, the trial court did not err in admitting during the state's case in chief evidence of prior convictions pursuant to this section, even though [former] Criminal Rule of Circuit Court Practice Rule 6.04 prohibits mentioning prior convictions except for impeachment, where the trial antedated the court rule, where the indictment was laid under the habitual criminal statute, and where a cautionary instruction was given to the jury regarding the prohibition against using prior convictions as substantive evidence of the cardinal charge. Davis v. State, 377 So. 2d 1076, 1979 Miss. LEXIS 2600 (Miss. 1979).

17. Previous concurrent sentences.

State proved that defendant was an habitual offender as he served two separate terms of one year or more because the State presented the supervisor of the records office at the Mississippi State Penitentiary, who testified that defendant served at least one year for each of his convictions for sexual battery and strongarm robbery; defendant's two sentences ran concurrently with each other, which was permitted under this statute; and he served a total of four years and three days within the custody of the Mississippi Department of Corrections for his two offenses. Clark v. State, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 518 (Miss. 2017).

Because defendant was previously sentenced to two separate crimes, he was properly convicted and sentenced as a habitual offender under Miss. Code Ann. § 99-19-83. The fact that the sentences ran concurrently was irrelevant. Hughes v. State, 989 So. 2d 434, 2008 Miss. App. LEXIS 464 (Miss. Ct. App. 2008).

18. Time served.

State presented insufficient evidence to make the requisite showing under Miss. Code Ann. § 99-19-83 because the exhibits did not demonstrate that defendant had been convicted of at least two previous felony convictions and sentenced to and served separate terms of one year or more for each conviction; defendant's sentences was vacated, and the case was remanded for resentencing because the evidence at the sentencing hearing would have met only the requirements of Miss. Code Ann. § 99-19-81. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Trial court erred in sentencing defendant as a habitual offender because the State of Mississippi did not prove beyond a reasonable doubt that defendant served a term of at least one year on each of his prior convictions. Watts v. State, 132 So. 3d 1062, 2014 Miss. App. LEXIS 110 (Miss. Ct. App. 2014).

Because new exhibits furnished by the State clearly established that a prisoner did qualify as a habitual offender under Miss. Code Ann. § 99-19-83 based on actual time served, the State's motion to alter and amend a judgment granting habeas relief was granted under Fed. R. Civ. P. 59(e) in that the prisoner could not successfully raise an exception to the procedural bar for his due process claim. Sumrell v. Mississippi, 2009 U.S. Dist. LEXIS 39162 (N.D. Miss. May 8, 2009), aff'd, 403 Fed. Appx. 959, 2010 U.S. App. LEXIS 25239 (5th Cir. Miss. 2010).

In a prior case, the inmate was sentenced to a 10-year sentence with five years to serve and five years on postrelease supervision for aggravated assault and possession of a firearm by a convicted felon, and in another prior case he was sentenced to three years for an unlawful possession of cocaine charge; thus, the evidence was sufficient to find that he was a habitual offender and to sentence him to life imprisonment under Miss. Code Ann. § 99-19-83. Issac v. State, 968 So. 2d 951, 2007 Miss. App. LEXIS 371 (Miss. Ct. App. 2007).

Defendant's service of more than one year of a concurrent 20-year sentence, in conjunction with his five prior felony convictions, was sufficient to meet the requirements of Miss. Code Ann. § 99-19-83 and sentence him as a habitual offender. Otis v. State, 853 So. 2d 856, 2003 Miss. App. LEXIS 762 (Miss. Ct. App. 2003).

The time span to be considered for the purpose of determining "time served" under this section runs from the time the defendant is incarcerated on the second, predicate felony offense, including pretrial incarceration, until the date on which the indictment on the third, habitual felony offense is returned. Feazell v. State, 761 So. 2d 140, 2000 Miss. LEXIS 37 (Miss. 2000).

19. Effective assistance of counsel.

Counsel was not ineffective for failing to contest the evidence the State offered at sentencing to prove defendant's habitual offender status because counsel contested his habitual offender status on grounds that his prior convictions did not constitute crimes of violence; the ineffective assistance claim based on the failure to contest Tony's habitual offender status was moot because the sentences were vacated and due to plain error on separate grounds. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Defendant's trial counsel was not ineffective by failing to object to the State of

Mississippi's motion to amend the indictment, to charge defendant as a habitual offender, when defendant contended that defendant did not serve one year for defendant's conviction for simple assault on a police officer, because the time served for defendant's grand-larceny conviction counted as time served for defendant's conviction for simple assault on a police officer. Hutchins v. State, 165 So. 3d 478, 2015 Miss. App. LEXIS 166 (Miss. Ct. App. 2015).

In a case in which an inmate appealed the trial court's summary dismissal of his post-conviction relief motion, since he was properly sentenced as a habitual offender, his claim was moot that his counsel was ineffective for allowing him to plead guilty as a habitual offender without proof or evidence of his prior convictions. Joiner v. State, 32 So. 3d 542, 2010 Miss. App. LEXIS 56 (Miss. Ct. App. 2010).

Defendant's sentence as a habitual offender pursuant to Miss. Code Ann. § 99-18-83 was proper where his counsel was not ineffective for a failure to object because the certified copy of defendant's conviction and the testimony provided proved that he was convicted of a crime in Louisiana and that he served a term of more than one year. Holloway v. State, 914 So. 2d 817, 2005 Miss. App. LEXIS 861 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offense. 5 A.L.R.2d 1080.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 A.L.R.2d 870.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 A.L.R.2d 227.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes. 24 A.L.R.2d 1247.

Pardon as affecting consideration of earlier conviction in applying habitual criminal statute. 31 A.L.R.2d 1186.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal. 79 A.L.R.2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses. 80 A.L.R.2d 1196.

Conviction under Dyer Act (18 USCS §§ 2312, 2313) as ground for enhancement of penalty under state habitual criminal statutes. 65 A.L.R.3d 586.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 A.L.R.5th 263.

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction. 97 A.L.R.5th 293.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment. 27 A.L.R. Fed. 110.

Am. Jur.

39 Am. Jur. 2d, Habitual Criminals and Subsequent Offenders §§ 1 et seq.

CJS.

24 C.J.S., Criminal Law §§ 2289, 2290, 2294, 2295 et seq.

Law Reviews.

1981 Mississippi Supreme Court Review: Criminal Law and Procedure. 52 Miss. L. J. 427, June, 1982.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Rape. 53 Miss LJ 149, March, 1983.

1982 Mississippi Supreme Court Review: Criminal Law and Procedure: Amendments to the Uniform Criminal Rules of Circuit Court Practice. 53 Miss LJ 162, March, 1983.

§ 99-19-84. Electronic monitoring as condition of probation for offense requiring registration as a sex offender; rules and regulations.

Whenever probation is a part of a sentence prescribed for an offense for which registration as a sex offender is required under Title 45, Chapter 33, the court may include as a condition of probation that the sex offender be placed on electronic monitoring. The Department of Corrections shall promulgate rules and regulations for the implementation of electronic monitoring of sex offenders on probation.

HISTORY: Laws, 2006, ch. 566, § 1; brought forward without change, Laws, 2014, ch. 457, § 80, eff from and after July 1, 2014.

§ 99-19-85. Governor's pardoning power unaffected.

Nothing in Sections 99-19-81 through 99-19-87 shall be construed or considered as seeking or tending to impair the pardoning power or other powers reserved to the Governor under Section 124 of the Mississippi Constitution of 1890.

HISTORY: Laws, 1976, ch. 470, § 3, eff from and after January 1, 1977.

Editor's Notes — Section 124 of the Mississippi Constitution referred to in this section, is codified as Miss. Const. Art. 5, § 124.

§ 99-19-87. Punishment by death unaffected.

Nothing in Sections 99-19-81 through 99-19-87 shall abrogate or affect punishment by death in any and all crimes now or hereafter punishable by death.

HISTORY: Laws, 1976, ch. 470, § 4; brought forward without change, Laws, 2014, ch. 457, § 81, eff from and after July 1, 2014.

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

Sec.	
99-19-101.	Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.
99-19-103.	Instructions; aggravating circumstances shall be designated by jury in writing upon recommending death; effect of jury's failure to agree on punishment.
99-19-105.	Review by State Supreme Court of imposition of death penalty.
99-19-106.	Date of execution of death sentence.
99-19-107.	Life sentence to be imposed if death penalty held to be unconstitutional.

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital

murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree thereto in writing. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant and the defendant's counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility for parole, or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If, after the trial of the penalty phase, the jury does not make the findings requiring the death sentence or life imprisonment without eligibility for parole, or is unable to reach a decision, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days

after certification by the sentencing court of the entire record, unless the time is extended for an additional period by the Supreme Court for good cause shown. The review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse or battery of a child in violation of subsection (2) of Section 97-5-39 or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was committed to influence the policy of a governmental entity by intimidation or coercion, or to affect the conduct of a governmental entity by mass destruction or assassination.

(i) The capital offense was especially heinous, atrocious or cruel.

(j) The capital offense was committed to intimidate or coerce a civilian population.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

(8) For the purposes of this section, to "intimidate" or "coerce" do not include peaceful picketing, boycotts or other nonviolent action.

HISTORY: Laws, 1977, ch. 458, § 2; Laws, 1983, ch. 429, § 2; Laws, 1994, ch. 566, § 1; Laws, 2013, ch. 556, § 1, eff from and after July 1, 2013.

Editor's Notes — Laws of 1994, ch. 566, § 5, provides as follows:

"SECTION 5. The provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994."

Cross References — Homicide, murder, capital murder defined, see § 97-3-19.

Penalty for murder or capital murder, see § 97-3-21.

Review by Supreme Court of imposition of death penalty, see § 99-19-105.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Inapplicability of Mississippi Rules of Evidence in sentencing proceedings, see Miss. R. Evid. 1101.

Bifurcated trials, see MRCrP 19.2.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. Validity.
2. In general.
3. Jury determination.
4. Excusing juror in capital murder prosecution, for cause.
5. —By peremptory challenge.
6. Voir dire.
7. Victim.
8. Aggravating factors, generally.
9. —Robbery and pecuniary gain as separate factors.
10. —"Especially heinous, atrocious, or cruel."
11. —"Avoiding or preventing lawful arrest or effecting escape from custody."
12. —Other convictions.
13. —Contemplation that lethal force would be used.
14. Weighing of aggravating and mitigating factors.
15. Kill, attempt to kill, or intend to kill.
16. Habitual offender status, generally.
17. —Hearing.
18. Mitigating factors, generally.
19. —Retarded, low IQ, or diminished capacity.
20. —Age or character.
21. Closing argument.
22. Jury instructions, generally.
23. — Prior felony involving use of threat of violence.
24. —Limiting instruction.
25. —Beyond a reasonable doubt.
26. —"Mercy" instruction.
27. Cruel and unusual punishment.
28. Life sentence.
29. Invalid or improper aggravating circumstance.
30. —Appellate court's right to reweigh.
31. Prosecutor's statements to jury, generally.
32. —Future crimes, future dangerousness or possibility of parole.
33. —Finality of decision or appellate process.
34. —Victim.
35. Harmless error.
36. Psychological testimony.
37. Ineffective assistance of counsel.
38. Racial discrimination in application of death penalty.
39. Sentencing hearing.
40. Alternate juror in sentencing phase.
41. Resentencing.

II. UNDER FORMER § 99-19-13.

42. In general.
43. Instructions.
44. Qualifications of jurors.
45. Sentence and punishment.

I. UNDER CURRENT LAW.

1. Validity.

Because defendant cited no authority supporting his proposition that the statute 99-19-101(3) was unconstitutional, he waived the issue for appellate review. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Defendant failed to show that the death-penalty scheme discriminated in violation of the Fourteenth Amendment because he simply pointed to statistical evidence as evidence of discrimination and failed to demonstrate that the decision-makers in his case acted with a discriminatory purpose. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

In a capital murder case, defendant's assertion that Miss. Code Ann. § 99-19-101 was unconstitutional under the Eighth Amendment was rejected because reckless disregard for human life was not an aspect of Mississippi's capital sentencing scheme; the State was not required to prove intent to kill, and the jury determined that defendant's conduct in participating in three homicides satisfied the four elements in Miss. Code Ann. § 99-19-107(a)-(d). Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

Where petitioner raped and murdered a 79-year-old victim, the burden was upon petitioner to prove that he was mentally retarded to such an extent as to avoid the death penalty. Where his IQ score of 81 placed him in the category of "low dull normal," and well above the maximum score for "mild" mental retardation, imposition of the death penalty was not cruel and unusual punishment. Further, the jury instructions given at the sentencing phase, in accordance with Miss. Code Ann. § 99-19-101(7), did not violate petitioner's Eighth Amendment rights since the factors contained in § 99-19-101(7) required that the jury find the requisite intent set forth in Enmund and Tison before a death penalty verdict could be returned. Gray v. State, 887 So. 2d 158, 2004 Miss. LEXIS 1166 (Miss. 2004), cert. denied, 545 U.S. 1130, 125 S. Ct. 2935, 162 L. Ed. 2d 870, 2005 U.S. LEXIS 4905 (U.S. 2005).

Mississippi's procedure, which requires jurors to find the existence of each aggravating circumstance beyond a reasonable doubt, but does not require the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, does not violate Apprendi or Ring, since the sentence is not determined by a judge, but by a jury. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

It was previously determined that Miss. Code Ann. § 97-3-19(2)(e), the portion of Mississippi's death penalty statute that provides for the application of the statute to all defendants found guilty of felony murder, is constitutional, as is Miss. Code Ann. § 99-19-101, which provides that a jury is to determine punishment in capital cases, and lists the mitigating and aggravating factors to be considered; jury instructions used in defendant's capital murder trial were in compliance with Enmund and Tison, in that the jury found that all four factors contained in Miss. Code Ann. § 99-19-101 as to intent beyond a reasonable doubt were present, including that defendant had intended to kill the victim. Grayson v. State, 879 So. 2d 1008, 2004 Miss. LEXIS 721 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593 (U.S. 2005).

Subsection (5)(d) does not violate the Eighth or Fourteenth Amendments to the United States Constitution. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

Sentencing scheme permitting imposition of death penalty for certain felony murders without a finding of intent to kill, but not for simple premeditated murder committed in atrocious manner, does not violate requirements of Eighth Amendment that death sentence not be excessive in relation to crime for which it was imposed and that death sentences be imposed with reasonable consistency. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Sentencing scheme permitting imposition of death penalty for certain felony murders without a finding of intent to kill, but not for simple premeditated murder committed in atrocious manner, does not violate equal protection or due process; legislature could have rationally decided that one class of murders either presented a different problem from the other or that the death penalty would be more effective deterrent to felony murders than to atrocious simple murders. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Jury executed process for narrowing class of persons eligible for death penalty by finding that defendant intended to kill and actually killed victim while contemplating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. Christmas v. State, 700 So. 2d 262, 1997 Miss. LEXIS 246 (Miss. 1997).

2. In general.

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Petitioner's argument that the capital sentencing statute, Miss. Code Ann. § 99-19-101, did not permit waiver of a jury for sentencing purposes was without merit because although § 99-19-101 provided for sentencing only by a jury in capital cases, § 99-19-101 specifically provided that a jury could be waived by a defendant in writing. Also, the record showed that petitioner's waiver was knowingly and intelligently made because she was advised as to the sentencing options available to a jury, or a judge sitting without a jury, after her capital murder conviction, and she signed a waiver stating that she understood that she could be sentenced in the discretion of the trial judge to death, life imprisonment without eligibility for parole, or life imprisonment as provided in § 99-19-101(1). Byrom v. State, 927 So. 2d 709, 2006 Miss. LEXIS 43 (Miss.), cert. denied, 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076 (U.S. 2006).

Defendant's capital murder conviction was proper because he did not need to receive a sentencing hearing since, even absent a procedural bar, if the State was not seeking the death penalty, the only possible sentence for conviction of capital murder was life without parole, Miss. Code Ann. § 99-19-101(1) and 47-7-3(1)(f). Thus, a sentencing hearing was not necessary. Davis v. State, 914 So. 2d 200, 2005 Miss. App. LEXIS 269 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), cert. denied, 549 U.S. 856, 127 S. Ct. 133, 166 L.

Ed. 2d 98, 2006 U.S. LEXIS 6743 (U.S. 2006).

Prisoner's claim that waiver of the sentencing jury and the imposition of a sentence of death by the trial court violated Miss. Code Ann. § 99-19-101 was barred from relitigation by Miss. Code Ann. § 99-39-21(3) and was without merit. Bishop v. State, 882 So. 2d 135, 2004 Miss. LEXIS 773 (Miss. 2004), cert. denied, 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123 (U.S. 2005).

Where an inmate pled guilty to capital murder, a jury was not required to impose a sentence of life without parole because it was the only possible sentence. Daughtery v. State, 847 So. 2d 284, 2003 Miss. App. LEXIS 504 (Miss. Ct. App. 2003).

Although all of petitioner death row inmate's arguments were procedurally barred either by res judicata or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. Jackson v. State, 860 So. 2d 653, 2003 Miss. LEXIS 355 (Miss. 2003).

Reading Miss. Code Ann. §§ 97-3-21, 99-19-101(1), 47-7-3(1)(f), together indicates that a defendant on trial for capital murder may only be sentenced to death or life imprisonment without the eligibility of parole. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

A jury's decision to impose a sentence of life imprisonment without eligibility for parole need not be unanimous. Jordan v. State, 786 So. 2d 987, 2001 Miss. LEXIS 109 (Miss. 2001), cert. denied, 534 U.S. 1085, 122 S. Ct. 823, 151 L. Ed. 2d 705, 2002 U.S. LEXIS 318 (U.S. 2002).

After the jury returned a guilty verdict for capital murder, it was proper for the court to dismiss the jury and impose a sentence of life without parole in the absence of any of the factors required for imposition of the death penalty since, after the effective date of § 47-7-3, there is really only a choice between death and life without parole in a capital case and, therefore, a jury determination was not necessary. Fair v. State, 766 So. 2d 787, 2000 Miss. App. LEXIS 400 (Miss. Ct. App. 2000).

Where the jury was instructed to return separate written findings as required by subsection (7) for both defendants, and it did so, the use of the plural "defendants" within the separate findings did not mean that the jury failed to make findings for each defendant individually. Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

At capital sentencing hearing, state may elect to stand on case made at first hearing, if before same jury, or may reintroduce any part of the evidence adduced at first hearing which it considers to be relevant to particular question of whether defendant shall suffer death or be sentenced to life imprisonment. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Any error arising out of admission of video duplicitous of photographic evidence was harmless, where video was no more gruesome than still photographs, sound had been edited from video, it was not lengthy, and it gave jury frame of reference as to crime which had occurred in another county. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Testimony of defendant's family to show impact that defendant's death would have on their lives was not relevant to defendant's character, record, or circumstances of offense, and thus, exclusion of such evidence was proper in sentencing phase of capital murder trial, despite admission of testimony of victim's family about effect crime had on their lives. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Victim impact evidence, if relevant, is admissible in sentencing stage of capital murder trial. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Testimony by victim's daughter that victim was survived by six children, five grandchildren, three siblings, and both parents and that murder had a "terrible" effect on victim's family, particularly on her mother, was admissible at sentencing trial. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Whether sentencing verdict form led jurors to overlook sentencing options other than death was waived on appeal due to defendant's failure to object, although space for foreman's signature was provided only for first sentencing option, the death penalty, not for second option, life imprisonment. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant was not denied constitutional right to cross-examine witnesses when their former testimony, as presented by them during guilt phase of capital murder trial, was read into evidence at resentencing, where defendant was afforded opportunity at the guilt phase to subject them to cross-examination and nothing new was added to testimony in resentencing; mere fact that defendant's new lawyers may have thought of some different questions to ask witnesses was not sufficient to demonstrate violation of confrontation clause. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Evidence pertaining to when defendant in capital murder case would be released on parole if sentenced to life in prison is merely speculative and should not be admitted for consideration at sentencing hearing. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In order to impose death sentence, jury must determine that defendant either actually killed, attempted to kill, and intended that killing take place, or intended that lethal force would be employed. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Upon determining that defendant actually killed or intended that a killing take place, jury must identify and weigh aggravating circumstances against mitigating circumstances which it has identified and, if it is unable to find aggravating circumstance or determines that aggravating circumstance is outweighed by mitigating circumstances, death penalty is statutorily barred. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

It is suggestive to provide signature line only under the verdict for death penalty. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Verdict form which provided for signature only under the death penalty and not under life sentence verdict was harmless where jury was instructed prior to deliberations that death penalty was not the only option. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L.

Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury was not required to find that aggravating circumstances outweighed mitigating circumstances beyond reasonable doubt before imposing death penalty. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Sentencing 17-year-old defendant to death was not prohibited merely because state statute did not explicitly state that 16 or 17-year-old defendant could be punished with execution for capital crime. Holly v. State, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Death penalty could be imposed on 17-year-old defendant without particularized findings as to his maturity and moral responsibility. Holly v. State, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

State, in its case in chief during penalty phase of capital murder case, is permitted to introduce evidence relevant to one or more of 8 statutory aggravating circumstances along with evidence from guilt phase relevant to Enmund factors, regarding circumstances surrounding victim's death. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

In the sentencing phase of a capital murder prosecution, the court properly allowed the introduction of a third party's statement that the third party killed the victims, as well as the third party's further statement indicating that the defendant killed the victims; both the inculpatory and exculpatory portions of the statement were relevant to mitigating circumstances. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to admit expert testimony regarding the defendant's polygraph tests; polygraph tests and their results are inadmissible under Mississippi law. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. Fuselier v. State, 654 So. 2d 519, 1995 Miss. LEXIS 222 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial judge did not err in admitting photographs of the victim into evidence where he made a thorough examination of the photographs in chambers prior to admitting them into evidence, and a pathologist testified that they were probative and relevant on the issue of whether the murder was especially heinous and cruel. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

An agreement between a capital murder defendant and the State for the imposition of a sentence of life imprisonment without the possibility of parole was void and unenforceable on public policy grounds where the defendant was not an habitual offender, since a sentence of life imprisonment without the possibility of parole is not an option unless the defendant is adjudged an habitual offender; the agreement was an attempt to circumvent

§ 99-19-101, which only authorizes a sentence of life imprisonment or death for capital murder, and its enforcement by the court would bind the parole board, which would effect judicial encroachment on an executive function. Lanier v. State, 635 So. 2d 813, 1994 Miss. LEXIS 165 (Miss. 1994), overruled in part, Twillie v. State, 892 So. 2d 187, 2004 Miss. LEXIS 1322 (Miss. 2004).

Since Mississippi's capital sentencing procedure requires the jury to determine whether the State has proved its case for the death penalty, the double jeopardy clause will protect a defendant from any subsequent attempt to subject him or her to the death penalty after a jury has impliedly acquitted him or her of the death penalty by determining that only a life sentence was warranted. Lanier v. State, 635 So. 2d 813, 1994 Miss. LEXIS 165 (Miss. 1994), overruled in part, Twillie v. State, 892 So. 2d 187, 2004 Miss. LEXIS 1322 (Miss. 2004).

The double jeopardy clause did not afford a capital murder defendant protection against further capital sentencing procedures where he was originally sentenced to death by a jury, the death sentence was subsequently reversed due to a confrontation clause problem but there was no finding that the State had failed to prove its case for the death penalty, and the defendant and the State then entered into a sentencing agreement which was found to be void; since there was no acquittal of the death penalty, the double jeopardy clause would not prohibit the State from seeking the death penalty at a subsequent sentencing hearing. Lanier v. State, 635 So. 2d 813, 1994 Miss. LEXIS 165 (Miss. 1994), overruled in part, Twillie v. State, 892 So. 2d 187, 2004 Miss. LEXIS 1322 (Miss. 2004).

Introduction, at capital sentencing proceeding, of evidence as to defendant's membership in white racist prison gang violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of white victim. Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), on remand, 608 A.2d 1201 (Del. 1992).

Imposition of death penalty after notice that state would not recommend it violated Fourteenth Amendment due process clause because of insufficient notice that penalty might be imposed; lack of adequate notice created impermissible risk that adversary process might have malfunctioned in case. Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173, 1991 U.S. LEXIS 2786 (U.S. 1991).

State sentencing statute providing for finding of aggravating and mitigating circumstances by trial court instead of by jury was valid; "heinous, cruel or depraved" aggravating circumstance does not fail to channel sentencer's discretion in violation of Eighth and Fourteenth Amendments because State Supreme Court has sought to give substance to operative terms of statute and its construction meets constitutional requirements; and contention that "heinous, cruel or depraved" circumstance was applied arbitrarily and, as applied, did not distinguish accused's case from others in which death sentence was not imposed, was in effect challenge to proportionality review of state's Supreme Court and would be rejected. Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511, 1990 U.S. LEXIS 3462 (U.S. 1990), overruled in part, Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556, 2002 U.S. LEXIS 4651 (U.S. 2002).

The Federal Constitution's Sixth Amendment guarantee of a criminal defendant's right to a jury trial does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, nor does it require jury sentencing even where the sentence turns on specific findings of fact; capital sentencing proceedings must satisfy the dictates of the due process clause of the Federal Constitution's Fourteenth Amendment. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to "refrain from further deliberations," which was insufficient to insure that the defendant's right to a fair hearing was not prejudiced. Holland v. State, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, it was not error for the district attorney to ask the defendant to take the murder weapon, stick it in his pants, then pull it out, aim it and pull the trigger, where the district attorney was having the defendant demonstrate the time it took him to go through those motions in response to the defendant's contention that he shot the victim on a sudden impulse. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

In the sentencing phase of a capital murder prosecution, the trial court did not err in excluding testimony of the defendant's family as to the impact of a death sentence on them, testimony of the family of a man who had been convicted of capital murder and executed as to the impact of his death sentence and execution on them, and testimony of the defendant's attorney about events surrounding the execution of that man, whom he had represented on appeal; such testimony is not relevant to the consideration of whether the death sentence should be imposed. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

In the sentencing phase of a capital murder prosecution, the district attorney's question during cross-examination of the defendant asking whether the thought of the victim having a Christian burial ever crossed his mind, and the district attorney's reference to a Christian burial during his closing argument did not constitute error. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

The enactment of this section, which established the bifurcated procedure in capital cases wherein "the jury shall set the sentence," did not eliminate the necessity of the sentencing procedure under the recidivism statute, § 99-19-81, and [former] Rule 6.04 of the Uniform Criminal Rules of Circuit Court Practice, when an indictment charges both capital murder and habitual status and a trial is conducted. The statutory language does not indicate that the jury in the guilt/sentencing phases of a bifurcated trial is to decide the issue of recidivism when a defendant is tried as a habitual offender on a charge of capital murder. Hoover v. State, 552 So. 2d 834, 1989 Miss. LEXIS 439 (Miss. 1989).

The maximum punishment upon conviction for rape under § 97-3-65 was life imprisonment where there was no proof that the defendant met any of the conditions set forth in this section for imposition of the death penalty. Leatherwood v. State, 548 So. 2d 389, 1989 Miss. LEXIS 358 (Miss. 1989).

In the sentencing phase of a capital murder prosecution, the trial court did not abuse its discretion in excluding the prison record of the defendant's accomplice who allegedly dominated the defendant and forced him to commit the murders since the prison record did nothing to focus on the defendant's character or susceptibility to domination or on the circumstances of the crime. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A capital murder defendant was not entitled to have a separate jury impaneled to hear the evidence at the penalty phase. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Defendant who is granted new trial, after having previously been tried for capital murder and found guilty, and who enters plea of guilty to murder prior to second trial on basis of erroneous advice from counsel that he could be given death penalty upon retrial is entitled to withdraw guilty plea and be given new trial at which, upon conviction, maximum penalty imposed could be life imprisonment. Odom v. State, 483 So. 2d 343, 1986 Miss. LEXIS 2374 (Miss. 1986).

There is no merit to contention that Mississippi may not constitutionally make murder committed in course of robbery "automatically" eligible for death penalty and thus "double count" by using that circumstance for definitional purposes at guilt phase and also as aggravating circumstance. Evans v. Thigpen, 631 F. Supp. 274, 1986 U.S. Dist. LEXIS 27843 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss. 1987).

Mississippi's capital murder statute requires specific written finding by jury relating to defendant's actions and intent, as prerequisite to imposition of death penalty, to be made in sentencing phase of bifurcated trial, even where defendant has entered plea of guilty in guilt phase of trial; defendant is not procedurally barred from raising issue on appeal notwithstanding defendant's failure to make contemporaneous objection. Pinkton v. State, 481 So. 2d 306, 1985 Miss. LEXIS 2424 (Miss. 1985).

Convicted capital murder defendant is not entitled, during sentencing phase of prosecution, to have jury consider, as relevant mitigating circumstance, that accomplices have received verdicts of life imprisonment from juries in separate capital murder trials. Johnson v. State, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Incriminating statement elicited from capital murder defendant by deputy sheriff in violation of Fifth and Sixth Amendment rights to counsel is inadmissible in sentencing phase of prosecution. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

In sentencing phase of capital case, prosecutor may secure testimony of coindictee in exchange for life sentence so long as coindictee is not coerced to point where coindictee's credibility is put in substantial doubt. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

Capital murder jury may not be informed during sentencing phase that defendant has already been sentenced to death in another state. West v. State, 463 So. 2d 1048, 1985 Miss. LEXIS 1869 (Miss. 1985).

The jury selection process under §§ 97-3-19 and this section is constitutional. Billiot v. State, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

Miss. Code § 97-3-21 and this section are not unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution on the ground that they do not allow the jury to sentence a defendant to life imprisonment without parole, since the legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, was unquestionably within their proper discretion. Smith v. State, 419 So. 2d 563, 1982 Miss. LEXIS 2112 (Miss. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803, 1983 U.S. LEXIS 4278 (U.S. 1983).

In a prosecution for capital murder, the defendant was not entitled to separate juries for the guilt and sentencing phases of his trial; since the same jury tried both phases of the trial, the defendant was only entitled to 12 peremptory challenges rather than the 24 he requested. Tubbs v. State, 402 So. 2d 830, 1981 Miss. LEXIS 2129 (Miss. 1981).

In the prosecution for the rape of a two-year-old female child, the failure of the defendant to receive a bifurcated trial on punishment and sentence did not constitute error where the defendant waived such a trial by failing to secure a ruling by the trial court, no objection was raised at the time of sentencing, and the state announced at the beginning of the trial that it would not seek the death penalty. Minor v. State, 396 So. 2d 1031, 1981 Miss. LEXIS 1989 (Miss. 1981).

The death penalty statute is not unconstitutionally vague. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

In a prosecution for capital murder committed during a burglary, the jury's verdict imposing the death penalty complied with this section, despite defendant's contention that the jury did not state the specific facts upon which it based its sentence, where neither this section nor case law required such detailed findings. However, pursuant to § 99-19-105, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. Coleman v. State, 378 So. 2d 640, 1979 Miss. LEXIS 2542 (Miss. 1979).

The trial court in a murder prosecution erred in requiring defendant at the punishment stage of trial to proceed before the state, since the state has the burden of proof not only as to guilt but also as to aggravating circumstances during the punishment stage of a trial. Gray v. State, 351 So. 2d 1342, 1977 Miss. LEXIS 1951 (Miss. 1977).

3. Jury determination.

Where the State sought imposition of a death sentence, defendant was denied his statutory right to have a jury determine his sentence. Moore v. State, 287 So. 3d 905, 2019 Miss. LEXIS 215 (Miss. 2019).

4. Excusing juror in capital murder prosecution, for cause.

No reversible error resulted from denial of defendant's challenge for cause of prospective juror at resentencing in capital case, where defendant exercised peremptory challenge to remove juror. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Refusal to quash jury panel or declare mistrial at resentencing on capital murder conviction for which defendant originally received death penalty, based on prospective juror's statement during voir dire questioning that he agreed with first sentence that defendant received, was not error; jury panel answered throughout voir dire that they could set aside their prejudices and reach a decision on the evidence, remark made no reference to which sentence was imposed, and there was no evidence at trial that jurors even heard remark. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Trial court acted within its discretion in excusing 4 potential jurors who stated that they probably could not impose death penalty when there were no eyewitnesses or fingerprints linking defendant to crime, and stated that they would need "a lot stronger proof" to change their position. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Decision of whether or not to excuse potential juror based on bias against death penalty is left to trial judge's discretion. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

For trial court to excuse potential juror for bias against death penalty, juror need not expressly state that he or she absolutely refuses to consider death penalty; equivalent response made in any reasonable manner indicating juror's firm position will suffice. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Prospective jurors in capital cases may only be excluded for cause based upon their views on capital punishment when those views would prevent or substantially impair performance of their duties as jurors in accordance with their instructions and oath. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert.

denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

If prospective juror who is opposed to death penalty indicates that, if convinced of defendant's guilt, he or she could return verdict of guilty which might result in death penalty, juror cannot be struck from jury. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

If prospective juror is irrevocably committed to vote against death penalty regardless of facts and circumstances, juror can be struck from jury. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Four prospective jurors in capital murder case were properly excused after stating their inability to impose death penalty. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court's questioning and dismissal of 6 venire members who expressed opposition to the death penalty was adequate, even though defense counsel was not allowed to repeat questions in his own words to prospective jurors during court's voir dire, where the trial court rephrased questions as requested, defense did not request permission to ask further questions, and there was no showing that further questioning would have rehabilitated dismissed venire members. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court could excuse prospective juror from serving on panel hearing capital murder case, on grounds that prospect was mother of 8-year-old boy and that she would feel apprehensive and be distracted if required to be away from child in event jury was sequestered. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial court did not improperly excuse prospective juror from service in capital murder case; prospect tailored her response to question whether she could follow the law at both phases of trial to whichever counsel was questioning her, and she indicated she did not want to be involved in jury service and only "guessed" that she would "try" to listen to evidence and be fair to both sides. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Any juror who would impose death sentence regardless of facts and circumstances of capital murder conviction cannot follow dictates of law and is subject to be removed through use of complementary challenge for cause. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Police officer was not required to be removed from capital murder jury panel, even though during general voir dire of venire he had stated that due to seriousness of charge of capital murder guilty verdict should be followed by death penalty, and officer admitted to knowing some details of case; officer had further stated that he believed his decision whether to impose death penalty would be based on circumstances and that he could be fair and impartial, and there was no automatic rule that law enforcement officers or their relatives could be challenged for cause. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prospective juror was not required to be removed from capital murder jury panel, even though he nodded his head affirmatively during group voir dire when asked whether he would automatically vote for death penalty, whether he believed in death penalty, and whether he would vote with majority of other jurors as to sentence; under further questioning he stated that he would evaluate the evidence and impose penalty which seemed most logical, and when informed that his vote was an individual choice prospect replied that he would vote whichever way evidence pointed, would be fair and impartial and

would follow law. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Court could strike for cause prospective juror in capital murder case who repeatedly stated that she was disposed to return life sentence, rather than death sentence, and did not know if she could base her decision on evidence and law. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

A trial court in a capital murder prosecution did not err in excusing a juror for cause where the juror stated that she opposed the death penalty and would not impose the death penalty under any circumstances. Russell v. State, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

Prospective jurors in a capital murder prosecution who had stated their opposition to the death penalty were improperly excluded without allowing the defense counsel the opportunity to question them. However, this error was harmless beyond a reasonable doubt where the answers the jurors gave were substantially clear, it was reasonably certain that the jurors were "Witherspoon-excludable," and it was unlikely that voir dire examination by the defense counsel would have rehabilitated the jurors sufficient to take them out of Witherspoon. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Jurors who indicate inability to vote for death penalty under any circumstances may be excluded from guilt phase of capital murder prosecution. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

5. —By peremptory challenge.

No reversible error results where defendant had peremptory challenges remaining at point where trial court fails to sustain challenge for cause. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Fact that 10 of 14 jurors and alternates were women precluded claim that prosecution engaged in improper gender based discrimination when exercising peremptory challenges. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court was not required to grant capital murder defendant additional peremptory challenges, for use in eliminating prospective jurors that trial court refused to remove for cause despite their avowed favoritism toward death penalty; defendant had not supported his claim that there were an unusual number of persons favoring death penalty among venirepersons, those that court had declined to remove for cause had been rehabilitated and those whose views on subject remained "unwavering" had been removed. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution presented race-neutral reason for peremptory strike of prospective juror in capital murder case; prospect had teenage daughter, and manner in which she responded to questions led prosecutor to feel that she was dealing with some problem prosecutor was unable to reach, and court indicated that prospect's demeanor was different from that of other prospects who had children. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution provided race-neutral reason for peremptory strike of black prospective juror in capital murder case; prospect took care of approximately 30 hogs and between 30 or 40 chickens, and would not be able to maintain her responsibilities if jury was required to be sequestered. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution gave race-neutral reason for peremptorily striking black prospective juror in capital murder case; juror had indicated unwillingness to serve and had stated that she might have difficulty in coming to any definite conclusion. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecution provided race-neutral reason for peremptory challenge of black prospective juror in capital murder case; prospect was on board of directors of organization devoted to providing back-up for defense attorneys in capital cases. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. Colosimo v. Senatobia Motor Inn, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge-that the juror indicated she would have difficulty finding suitable child care during the trial-was sufficiently race-neutral. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In a capital murder prosecution, the court's failure to excuse for cause a potential juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

6. Voir dire.

Trial court did not err at resentencing in capital case in refusing defendant's request that every prospective juror be individually sequestered for voir dire in view of publicity surrounding case; such procedure was not required under applicable criminal rule, and limited individual sequestered voir dire was conducted when warranted. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Denial of defense motion at resentencing in capital case to have all prospective jurors answer questionnaire was not error, where defendant cited no authority to support entitlement to such a procedure and failed to present evidence that he was unable to otherwise generally question jurors at voir dire. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Refusal to permit defendant in capital sentencing proceeding to ask prospective jurors hypothetical question as to whether they would rule out possible involvement of alcohol as mitigating factor in determining whether to recommend life without parole or death penalty was not abuse of discretion. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Attorneys are barred from trying to get jury to promise that under hypothetical set of circumstances, they will vote a certain way. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

7. Victim.

Physical injuries suffered by murder victim and defendant's actions following murder forming res gestae of crime may give rise to an inference that murder was committed to avoid arrest, thus establishing aggravating circumstance. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Testimony by murder victim's daughter centering around disappearance and kidnapping of her mother after she left church and describing some of her mother's personal characteristics was necessary to development of case, was relevant to aggravating circumstance of kidnapping, and was admissible in sentencing trial, despite minimum probative value of evidence about victim's marriage, where state made no attempt to establish impact of victim's death on her husband. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

In the sentencing phase of a capital murder prosecution, the trial court did not err in permitting evidence that the victim was 26 years old, had a 7-year-old son, had been married for 4 years, and was very shy and did not like to wear dresses because they exposed her legs where the evidence was proper and necessary to the "development of the case and true characteristics of the victim" and could not serve in any way to incite the jury. Jenkins v. State, 607 So. 2d 1171, 1992 Miss. LEXIS 576 (Miss. 1992).

A circuit court did not err when it allowed the prosecution to present a photograph of a substantial part of the body of the victim in the penalty phase of a capital murder prosecution, where the photograph was carefully cropped so as to reflect only the back of the victim's body, there was nothing gruesome about the photograph, prosecution witnesses testified that the photograph fairly and accurately depicted the location of the entrance wound on the lower back, and the photograph was presumably offered as evidence that the homicide was "especially heinous, atrocious or cruel." Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

Testimony during the sentencing phase of a capital murder prosecution as to the victim's housekeeping habits did not constitute inadmissible victim impact statements where the evidence was offered to support the State's proof of an attempted robbery inasmuch as the victim was found in her home which was in a state of disarray. Shell v. State, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

Trial court did not improperly permit admittance during sentencing stage of trial of 9 color slides of homicide victim, spent bullet and certain personal belongings of victim, testimony of pathologist and investigating officer with respect to cause of death and scene of crime, and testimony of victim's brother, as all items were relevant to aggravating circumstances state was required to prove in its capital case, establishing crime scene and other particulars of crime and establishing identity of victim. Evans v. Thigpen, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss.), cert. denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782, 1987 U.S. LEXIS 3045 (U.S. 1987), disapproved, Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. Stringer v. State, 500 So. 2d 928, 1986 Miss. LEXIS 2609 (Miss. 1986).

In the sentencing phase of a capital murder charge, while admission of testimony as to decedent's character was error in that it had no relevancy to the 8 aggravating circumstances enumerated in this section, the gravity of the error did not arise to the level of a reversible one. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In the sentencing phase of a capital murder case, the trial court properly admitted photographs into evidence which showed certain physical evidence in a robbed store, including the victim's body. Additionally, cross-examination of defendant in the sentencing phase concerning his guilty plea in an attempt to refute defendant's claim that the homicide was not intentional was not improper impeachment and did not constitute reversible error, since it had relevance on the issue of whether or not the homicide was especially heinous, atrocious or cruel. Gilliard v. State, 428 So. 2d 576, 1983 Miss. LEXIS 2437 (Miss.), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179, 1983 U.S. LEXIS 1737 (U.S. 1983), disapproved, Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, 1986 U.S. LEXIS 150 (U.S. 1986).

In a prosecution for capital murder the trial court properly admitted into evidence at the sentencing phase color photographs showing the body of the victim and the scene of the crime, despite the fact that such proof was not related to the aggravating circumstances set forth in this section, where such proof was admitted by the defendant by his plea of guilty in open court, and since an orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. Evans v. State, 422 So. 2d 737, 1982 Miss. LEXIS 2269 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 314, 1983 U.S. LEXIS 4708 (U.S. 1983).

8. Aggravating factors, generally.

Because there was a credible concern about the validity of a prior armed conviction used as an aggravating factor, the Supreme Court had before it an adequate record of that prior conviction, and the Supreme Court was required by statute to ensure the validity of the death sentence, the Supreme Court indicated it would undertake a review of defendant's prior armed robbery that would go beyond the mere face of the conviction. Hollie v. State, 174 So. 3d 824, 2015 Miss. LEXIS 488 (Miss. 2015), overruled in part, Pitchford v. State, 240 So. 3d 1061, 2017 Miss. LEXIS 420 (Miss. 2017).

Imposition of the death penalty was supported by a finding that the capital offense was committed while defendant was engaged in the commission of arson and was especially heinous, atrocious or cruel. Ronk v. State, 172 So. 3d 1112, 2015 Miss. LEXIS 219 (Miss. 2015), cert. denied, — U.S. —, 136 S. Ct. 1657, 194 L. Ed. 2d 773, 2016 U.S. LEXIS 2643 (U.S. 2016), in part, — So. 3d —, 2016 Miss. LEXIS 493 (Miss. 2016).

Trial court did not err by allowing the jury to consider the aggravating factor of great risk of death to many persons where the State's theory was that defendant intended to kill one particular victim because she fired him and withheld his pay and, in the process of doing so, he shot and killed the others. Because defendant shot four victims in the same room, the evidence was sufficient to warrant the instruction. Flowers v. State, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, — U.S. —, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Aggravating circumstances used as grounds for defendant's death sentence did not have to be included in the indictment because Apprendi did not require the inclusion of aggravating circumstances in defendant's indictment. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Evidence legally or factually supported the jury's finding of each of the statutory aggravating circumstances of (1) the capital murder was committed during the commission of the crime of robbery; (2) the capital murder was committed for the purpose of avoiding arrest; and (3) the capital murder was especially heinous, atrocious, or cruel. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Defendant's death by lethal injection sentence was neither excessive nor disproportionate where there was sufficient evidence to support the jury's finding of the statutory aggravating circumstance enumerated by Miss. Code Ann. § 99-19-101(5)(d), and the record did not establish that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Pitchford v. State, 45 So. 3d 216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

Avoiding arrest and robbery aggravators are not the same, as more evidentiary support is required to support an instruction on the avoiding arrest factor. Wiley v. Epps, 668 F. Supp. 2d 848, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. 2009), aff'd, 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Although the inmate argued that if the evidence established he murdered to avoid arrest, then the aggravating factor was impermissibly overbroad, as it failed to genuinely narrow the facts of this capital murder from any other capital murder, Mississippi's construction served to appropriately narrow the application of this factor to those defendants who purposefully killed their victim to avoid or prevent arrest for the commission of the underlying felony. Wiley v. Epps, 668 F. Supp. 2d 848, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. 2009), aff'd, 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Victims knew the inmate, the inmate fired three shots, killing one witness and seriously injuring the other, he left the murder weapon and box that had contained the money bag in a densely thicketed area, and he threw the empty money bag in some weeds near a dirt road; there was evidence from which the jury could have reasonably inferred that a substantial reason for the murder was to conceal the inmate's identity, or cover his tracks, so as to avoid apprehension and eventual arrest. Therefore, the granting of the instruction on the avoiding arrest aggravator was proper. Wiley v. Epps, 668 F. Supp. 2d 848, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. 2009), aff'd, 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

In a proportionality review under Miss. Code Ann. § 99-19-105(3), defendant's death sentences for her two capital murder convictions were not excessive or disproportionate because (1) they were not imposed under the influence of passion or prejudice; (2) the evidence supported the jury's finding of statutory aggravating circumstances that the capital offenses were committed while defendant was engaged in or was an accomplice in the commission of or an attempt of flight after committing a robbery, that they were committed for the purpose of avoiding or preventing a lawful arrest, and that they were especially heinous, atrocious, or cruel under Miss. Code Ann. § 99-19-101(5)(d), (e), and (h); and (3) in comparing other cases to defendant's case, the death sentence had been imposed in factually similar cases. Chamberlin v. State, 989 So. 2d 320, 2008 Miss. LEXIS 352 (Miss. 2008), cert. denied, 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495 (U.S. 2009).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate under Miss. Code Ann. § 99-19-101(5) and (7) because an indictment was sufficient without listing aggravating circumstances; any time an individual was charged with murder, he was put on notice that the death penalty might result. Loden v. State, 971 So. 2d 548, 2007 Miss. LEXIS 558 (Miss. 2007), cert. denied, 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568 (U.S. 2008).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326, 2006 Miss. LEXIS 531 (Miss. 2006), cert. denied, 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278 (U.S. 2007).

In a case where defendant was found guilty of capital murder – murder during the commission of sexual battery on a six-month-old victim – the death penalty imposed on defendant was (1) not influenced by passion, prejudice, or other existing arbitrary factor; (2) supported by the jury's finding of one or more statutory aggravating circumstances, specifically those set out in Miss. Code Ann. § 99-19-101(5)(d) and (h); (3) not based on invalid statutory aggravating circumstances; and (4) not disproportionate to other cases of that type (death during the commission of a sexual battery of a young victim). Thus, his death penalty was affirmed. Havard v. State, 928 So. 2d 771, 2006 Miss. LEXIS 90 (Miss. 2006), cert. denied, 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153 (U.S. 2007).

In a case where defendant was found guilty of capital murder – murder during the commission of sexual battery on a six-month-old victim – an aggravating factor that the capital offense was especially heinous, atrocious, or cruel under Miss. Code Ann. § 99-19-101(5)(h), was not subsumed by the sexual battery aggravator in Miss. Code Ann. § 99-19-101(5)(d); also, the jury could have found that either aggravating circumstance existed in defendant's case. Furthermore, it was not improper to use the underlying felony of sexual battery to elevate defendant's crime to capital murder and use it as an aggravating circumstance; thus, defendant's conviction and sentence were affirmed. Havard v. State, 928 So. 2d 771, 2006 Miss. LEXIS 90 (Miss. 2006), cert. denied, 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153 (U.S. 2007).

Defendant contended that the indictment failed to charge all of the elements necessary to impose the death penalty under Mississippi law, but his argument failed because (1) pursuant to Miss. Code Ann. § 99-19-101(7), a jury only needed to find that defendant killed, and did not need a true mens rea; (2) under Miss. Code Ann. § 99-19-101(5), aggravating circumstances existed; and (3) there was no increase in the maximum penalty because the maximum penalty for killing while engaged in the commission of sexual battery was death as the crime was defined as capital murder under Miss. Code Ann. § 97-3-19(2)(e), and, pursuant to Miss. Code Ann. § 1-3-4, a capital murder was a crime punishable by death. Havard v. State, 928 So. 2d 771, 2006 Miss. LEXIS 90 (Miss. 2006), cert. denied, 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153 (U.S. 2007).

Court rejected petitioner's claim that her indictment was defective because the aggravating factors were not included in the indictment. It is unequivocal that in cases where consideration of the death penalty is applicable, there is no requirement that the applicable statutory aggravating factors be included in the indictment. All that is required in the indictment is a clear and concise statement of the elements of the crime charged and the Mississippi death penalty statute, Miss. Code Ann. § 99-19-101, clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment; therefore, every time an individual is charged with capital murder, they are put on notice that the death penalty may result. Byrom v. State, 927 So. 2d 709, 2006 Miss. LEXIS 43 (Miss.), cert. denied, 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076 (U.S. 2006).

Death penalty was properly imposed where defendant was an active participant in a murder; although defendant did not kill the victim, he was an aggressor, and he willfully imposed great danger upon the victim. Defendant held the victim down while another man hit the victim in the head with a hammer, and he chased the victim and brought him back for the beating to continue. Bishop v. State, 882 So. 2d 135, 2004 Miss. LEXIS 773 (Miss. 2004), cert. denied, 543 U.S. 1189, 125 S. Ct. 1401, 161 L. Ed. 2d 194, 2005 U.S. LEXIS 2123 (U.S. 2005).

Mississippi's capital sentencing scheme complies with the Sixth Amendment requirement that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, because under Miss. Code Ann. § 99-19-101 it is the jury that determines the presence of aggravating circumstances necessary for the imposition of the death sentence. Berry v. State, 882 So. 2d 157, 2004 Miss. LEXIS 802 (Miss. 2004), cert. denied, 544 U.S. 950, 125 S. Ct. 1694, 161 L. Ed. 2d 528, 2005 U.S. LEXIS 2822 (U.S. 2005).

Based on case law and statutes of Mississippi, the submission of the "great risk of death to many persons" aggravator did not violate defendant's Eighth Amendment rights. Flowers v. State, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

In a capital murder case where defendant was indicted separately for each of four murders, submission of the "great risk of death to many persons" aggravator was proper, as evidence regarding the other three killings was relevant in the case at bar during sentencing; there was evidence that the same weapon was used to commit all four murders, testimony linked defendant to the weapon, and eyewitness testimony placed defendant near the scene of the crime. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Contamination of neighborhood's waters with murder victim's body parts, intending to attract alligators, satisfies Miss. Code Ann. § 99-19-101(5)(c)'s "great risk of death to many persons" aggravating circumstance. Simmons v. State, 805 So. 2d 452, 2001 Miss. LEXIS 316 (Miss. 2001), cert. denied, 537 U.S. 833, 123 S. Ct. 142, 154 L. Ed. 2d 51, 2002 U.S. LEXIS 6175 (U.S. 2002).

Statutory aggravating factor providing that defendant could be sentenced to death if defendant killed a person during the commission of a burglary was not unconstitutional as the sentencing body's discretion was limited by statutes that made sure its decisions were directed and limited in such a way, primarily involving the existence of other statutes, that allowed the sentencing body to avoid arbitrary and capricious executions; in other words, allowing for the death penalty where that aggravating factor existed meant the punishment was not excessive relative to the crime and insured the death penalty is imposed with reasonable consistency. Grayson v. State, 806 So. 2d 241, 2001 Miss. LEXIS 303 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800 (U.S. 2002).

"Great risk" aggravator under Miss. Code Ann. § 99-19-101(5)(c) contemplates more than a showing of some degree of risk to a few persons; to pose a great risk, there must be a high probability of danger, not a mere possibility. Snow v. State, 800 So. 2d 472, 2001 Miss. LEXIS 242 (Miss. 2001), cert. denied, 535 U.S. 1099, 122 S. Ct. 2299, 152 L. Ed. 2d 1056, 2002 U.S. LEXIS 3894 (U.S. 2002), in part, 875 So. 2d 188, 2004 Miss. LEXIS 669 (Miss. 2004).

"Great risk" aggravator under Miss. Code Ann. § 99-19-101(5)(c) was properly applied to defendant who shot and killed two deputies in a car while one of the deputies was driving, risking that the car would go out of control or that a bullet would ricochet; the fact that no one else was actually injured was immaterial. Snow v. State, 800 So. 2d 472, 2001 Miss. LEXIS 242 (Miss. 2001), cert. denied, 535 U.S. 1099, 122 S. Ct. 2299, 152 L. Ed. 2d 1056, 2002 U.S. LEXIS 3894 (U.S. 2002), in part, 875 So. 2d 188, 2004 Miss. LEXIS 669 (Miss. 2004).

It is permissible to use subsections (5)(a) and (5)(b) of this section as separate aggravators even though they were premised on the same conviction. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S. 2000), in part, 2011 Miss. LEXIS 50 (Miss. Jan. 20, 2011).

The eight statutory factors do not include arrests or incarcerations; instead only felony convictions involving the use or threat of violence are admissible. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

Evidence was insufficient to support the aggravating factor that the defendant knowingly created a great risk of death to many persons where (1) the defendant and another person were hired to kill the victim, (2) they went to the victim's home on a Saturday morning, and several cars were parked in the driveway, (3) the defendant hid outside the doorway of the victim's home, and (4) when the victim came to the door, the defendant shot him and ran. Porter v. State, 732 So. 2d 899, 1999 Miss. LEXIS 1 (Miss. 1999).

State is required in capital sentencing proceeding to present evidence of both aggravating circumstances and guilt, so for as *Enmund* factors relating to intent to kill require proof of guilt. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Jury executed process for narrowing class of persons eligible for death penalty by finding that defendant intended to kill and actually killed victim while contemplating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Remand for new sentencing hearing was required due to trial court's failure to supply jury in capital murder trial with properly limiting definition of "especially heinous, atrocious or cruel" upon submission of such aggravating factor to jury; Supreme Court would not reweigh remaining aggravating and mitigating factors disregarding offending factor, or review sentence applying harmless error standards, as weighing of aggravating circumstances was at time of imposition of original sentence function of jury. (Per

Banks, J., with three Justices concurring and one Justice concurring in result only.) Booker v. State, 699 So. 2d 132, 1997 Miss. LEXIS 375 (Miss. 1997).

During penalty phase of capital murder prosecution involving murder of child victim while engaging in felonious abuse and/or battery, it was proper to instruct jury that it could consider as aggravating factor that murder had occurred during commission of crime of felonious abuse and/or battery of child. Brown v. State, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, — So. 3d —, 2017 Miss. LEXIS 524 (Miss. 2017).

Aggravating circumstance that defendant created great risk of death to many persons applied to defendant who fatally stabbed four children and inflicted life-threatening stab wounds on one adult and two other children. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Use of "great risk to many persons" aggravating circumstance is not restricted to those crimes where very large numbers of individuals were at risk or those where safety of others than intended few was jeopardized. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Jury in resentencing phase of capital murder prosecution did not have to be instructed on elements of capital murder, murder and kidnapping in order to find beyond reasonable doubt existence of aggravating circumstance that murder was committed during kidnapping, though it would have been optimum situation to include such instruction; omission of kidnapping instruction in resentencing phase was cured by original jury's convicting defendant of murder and kidnapping. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Jury in resentencing phase of capital murder trial did not have to "re-find" elements of murder or kidnapping in finding aggravating circumstance of murder during kidnapping, but could rely on prior finding made by jury during guilt- finding phase. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In considering kidnapping aggravator in reviewing death sentence for murder, Supreme Court had to decide whether jury heard enough evidence to make determination of kidnapping. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Guilt-phase jury's finding of guilt with capital murder instruction was constitutionally sound basis for imposition of death penalty based on kidnapping aggravator since it narrowed the class of persons eligible for the death penalty. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Evidence at resentencing in capital murder prosecution was sufficient for jury to find aggravating factor that murder was committed during kidnapping, though witness stated that he could not see for sure whether defendant dragged victim into woods or whether her legs were moving to indicate she was walking, where there was other evidence of kidnapping including testimony of witness that he observed defendant tackle victim when she attempted to run away, and sufficiency of proof as to kidnapping had already been decided at guilt phase of trial. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Statute stating that evidence may be presented in capital murder proceeding as to any matter that court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances applies even if it is necessary for another jury to determine the issue of penalty. Williams v. State, 684 So.

2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Where defendant was charged with two acts of sexual battery, one of which constituted the underlying felony to the capital murder and the other of which served as the basis of separate sexual battery conviction, the latter aggravated the crime and narrowed the class of defendants eligible for the death penalty substantially. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecution had no burden to bear with respect to proof that aggravated assault was a crime of violence and could be considered as an aggravating circumstance as such in capital murder prosecution, as aggravated assault by its very definition signifies violence. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Finding of aggravating circumstance in death penalty case that defendant was under sentence of imprisonment at time of murder was supported by evidence provided in guilt phase that defendant was on parole for life sentence. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder while engaged in commission of kidnapping or flight after kidnapping; victim's body was found in car with windows open approximately 2 months after her disappearance, which did not provide sufficient evidence beyond a reasonable doubt that defendant had kidnapped victim. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court committed reversible error in death penalty phase of murder trial by submitting 5 aggravating factors to jury, 3 of which where unsupported by evidence that could substantiate jury's finding of those factors. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Capital murder aggravating circumstance, that defendant knowingly created a "great risk of death to many persons," applied to defendant who stabbed 4 children to death and inflicted life-threatening stab wounds on one adult and another child. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder aggravating factor for when defendant knowingly creates great risk of death to many persons applies when there are multiple victims; aggravating factor is not limited to instances when there is a great risk to those other than intended victims. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Considering underlying crime of felonious abuse as aggravating factor during sentencing of capital murder defendant did not fail to narrow class of defendants eligible for death penalty, in violation of Eighth Amendment; fact that aggravating circumstance duplicates element of crime does not make death sentence constitutionally infirm. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Submission of "robbery" aggravating circumstance during penalty phase of capital murder case did not violate constitutional prohibition against cruel and unusual punishment, although defendant was charged with murder while in commission of armed robbery. Holly v. State, 671 So. 2d 32, 1996 Miss. LEXIS 15

(Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Testimony dealing with victim's murder, offered at resentencing in capital murder case to give second sentencing jury evidence of specific facts surrounding murder, not to prove murder was "especially atrocious, heinous or cruel," was relevant, and its admission did not violate due process by relating to aggravating factor not mentioned in motion in limine; defendant entered sentencing hearing knowing that prosecution was seeking death penalty and that State would attempt to prove 2 aggravators and proof associated with each, and was apprised that jury would be informed of facts surrounding murder, but did not object. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

The new rule announced in Willie v. State (Miss. 1991) 585 So. 2d 660 – that a jury may not "doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators" when determining the sentence to be imposed in a capital murder case – is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

A trial court erred when it allowed the prosecutor to repeatedly explore the defendant's propensity for future crimes during the sentencing phase of a capital murder prosecution, since propensity to commit future crimes is not one of the 8 aggravating circumstances authorized by subsection (5) of this section. Balfour v. State, 598 So. 2d 731, 1992 Miss. LEXIS 131 (Miss. 1992).

Introduction, at capital sentencing proceeding, of evidence as to defendant's membership in white racist prison gang violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of white victim. Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), on remand, 608 A.2d 1201 (Del. 1992).

Conviction of assault to commit rape occurring 20 years prior to capital murder trial may not be considered as aggravating circumstance in determining whether to impose death penalty when the conviction is thereafter reversed. Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575, 1988 U.S. LEXIS 2657 (U.S. 1988).

Trial court did not improperly permit admittance during sentencing stage of trial of 9 color slides of homicide victim, spent bullet and certain personal belongings of victim, testimony of pathologist and investigating officer with respect to cause of death and scene of crime, and testimony of victim's brother, as all items were relevant to aggravating circumstances state was required to prove in its capital case, establishing crime scene and other particulars of crime and establishing identity of victim. Evans v. Thigpen, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss.), cert. denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782, 1987 U.S. LEXIS 3045 (U.S. 1987), disapproved, Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

Petitioner who at time of homicide was under suspended sentence from convictions for grand larceny and burglary could properly be deemed to be "under sentence of imprisonment" for purposes of subsection (5)(a) of this section. Evans v. Thigpen, 631 F. Supp. 274, 1986 U.S. Dist.

LEXIS 27843 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss. 1987).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling Johnson v. State (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) Johnson v. State, 547 So. 2d 59, 1989 Miss. LEXIS 356 (Miss. 1989), overruled, Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992), but see Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

The constitutional principles of double jeopardy are not violated by the "double use" of the pecuniary gain factor in elevating a murder to the status of capital murder because it was perpetrated by one who had been given something of value for the killing pursuant to § 97-3-19(2)(d) and in imposing the death penalty for committing murder by pecuniary gain pursuant to subsection (5)(f) of this section. Nixon v. State, 533 So. 2d 1078, 1987 Miss. LEXIS 2917 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012, 1989 U.S. LEXIS 2745 (U.S. 1989), overruled, Wharton v. State, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

The "beyond a reasonable doubt" standard of proof applies in the sentencing phase of capital trials. Capital sentencing juries have no authority to find statutory aggravating circumstances unless such "unanimously be found beyond a reasonable doubt." White v. State, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

Submission to jury of aggravating circumstances alleging commission of murder in course of burglary, robbery, and/or kidnapping did not deny defendant his constitutional rights. Lockett v. State, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

In the sentencing phase of a capital murder trial, the state is limited to offering evidence that is relevant to one of aggravating circumstances included in this section. Stringer v. State, 500 So. 2d 928, 1986 Miss. LEXIS 2609 (Miss. 1986).

Where the existence of aggravating circumstances enumerated in this section is in evidence, the trial court will not peremptorily instruct the jury to return a verdict of life imprisonment. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Under subsection (7) of this section, the jury must find the existence of only one aggravating circumstance to return a death sentence. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Prior conviction for rape, crime of violence to person, is admissible during sentencing phase of capital murder prosecution. Johnson v. State, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

In a prosecution for murder the trial court during the sentencing phase of the trial properly confined the jury to finding only aggravating circumstances that were proven by the evidence, where the court specifically instructed the jury that it was to find beyond a reasonable doubt that one or more of the three stated aggravated circumstances existed before a death penalty verdict could be returned, and where it specifically instructed that if none of these elements were found to exist the death penalty could not be imposed. Wheat v. State, 420 So. 2d 229, 1982 Miss. LEXIS 2206 (Miss. 1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1507, 75 L. Ed. 2d 936, 1983 U.S. LEXIS 4354 (U.S. 1983).

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. Culberson v. State, 379 So. 2d 499, 1979 Miss. LEXIS 2528 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250, 1980 U.S. LEXIS 3943 (U.S. 1980).

9. —Robbery and pecuniary gain as separate factors.

Defendant's contention that the trial court erred by instructing the jury to consider the aggravating factor of armed robbery for pecuniary gain was without merit because when pecuniary gain and armed robbery were used within the same factor, the concern of the jury doubly weighing the aggravating factors was not prest. Flowers v. State, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, — U.S. —, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Where a shooting was committed during a robbery, the evidence supported the jury's finding of an aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(d), even if defendant was not the shooter; whether or not defendant intended to kill the victim was irrelevant because Miss. Code Ann. § 97-3-19(2)(e) defines capital murder, in part, as the killing of a human being when done with or without any design to effect death, by any person engaged in the commission of the crime of robbery. Dycus v. State, 875 So. 2d 140, 2004 Miss. LEXIS 366 (Miss. 2004), vacated, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212 (U.S. 2005).

Trial court in sentencing proceeding should not submit as separate aggravators both fact that capital murder was committed during commission of robbery and that it was committed for pecuniary gain; where two aggravators essentially comprise one circumstance, it is improper for jury to doubly weigh that circumstance. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) Booker v. State, 699 So. 2d 132, 1997 Miss. LEXIS 375 (Miss. 1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at punishment stage to object to robbery aggravator on ground that aggravating circumstance unconstitutionally duplicated element of offense of capital murder because jury found that defendant committed capital murder in commission of crime of robbery; Supreme Court had already rejected that contention and, thus, there was no reason for counsel to object to underlying felony being counted as aggravator. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at sentencing phase to object to double use of robbery and pecuniary gain aggravating circumstances; defendant's trial took place before effective date of later state Supreme Court decision prospectively prohibiting double counting for same conduct and, thus, defense counsel had no basis to object. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Although evidence that safe in victims' home contained proceeds of illegal drug sales made by defendant's brother was not relevant to pecuniary gain aggravating circumstance during sentencing phase of capital murder case, any error in admitting such evidence was harmless, where evidence of brother's drug conviction and his connection with money in safe was admitted during guilt phase of trial. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Robbery, by definition, is committed for pecuniary gain and thus robbery and pecuniary gain cannot be used as two separate aggravating circumstances in capital murder prosecution. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in allowing the jury to consider the aggravating factors of "murder committed while in the commission of a robbery" and "murder committed for pecuniary gain" as 2 separate and distinct aggravators. Jenkins v. State, 607 So. 2d 1171, 1992 Miss. LEXIS 576 (Miss. 1992).

In the sentencing phase of a capital murder prosecution arising from a murder committed while the defendant was engaged in the commission of a robbery, the pecuniary gain and robbery aggravating circumstances may not be given. When life is at stake, a jury cannot be allowed the opportunity to doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Where an indictment charges a robbery/murder capital offense and robbery is designated as an aggravating circumstance, pecuniary gain should not be used as an aggravating circumstance unless clearly supported by the evidence. Likewise, the aggravating circumstance that the capital offense "was committed for the purpose of avoiding lawful arrest," should not be used unless clearly supported by the evidence. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

There is no merit to contention that Mississippi may not constitutionally make murder committed in course of robbery "automatically" eligible for death penalty and thus "double count" by using that circumstance for definitional purposes at guilt phase and also as aggravating circumstance. Evans v. Thigpen, 631 F. Supp. 274, 1986 U.S. Dist. LEXIS 27843 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss. 1987).

Evidence that, after killing victim, capital murder defendant took victim's automobile and subsequently pawned things of value contained in automobile may be basis for finding, as aggravating circumstances, both that murder took place during commission of robbery and that murder was for pecuniary gain. West v. State, 463 So. 2d 1048, 1985 Miss. LEXIS 1869 (Miss. 1985).

Testimony in a capital murder prosecution was sufficient for the jury to find that the infliction of the wounds was "unnecessarily tortuous" and was "pitiless", so that it was properly found to be "especially heinous, atrocious or cruel" within the meaning of subsection (5)(h) of this section; moreover, the jury was properly permitted to consider as a aggravating circumstance, under subsection (5)(d) of this section, that the murder was committed in the course of the commission of a robbery; finally, upon careful examination of the sentencing phase in the manner required by § 99-19-105, the Supreme Court would find that defendant's execution would be consistent and even-handed with all death penalty cases affirmed since 1976. Billiot v. State, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

Following defendant's conviction for capital murder, based upon a murder committed in the course of a robbery, the trial court's instructions to the jury during the sentencing phase that it could consider as aggravating circumstances both that the murder was committed during the commission of a robbery and that it was committed for pecuniary gain, pursuant to subsections (d) and (f) of this section, did not so unduly prejudice defendant that the issue could be raised for the first time on appeal; moreover, the trial court did not err in permitting the jury to consider as an aggravating circumstance that the capital offense was committed while the defendant was engaged in the commission of a robbery, pursuant to subsection (5)(d) of this section, even though the robbery was an element of the capital murder, since the conviction of capital murder did not mandate the defendant's execution, but merely subjected him to a jury finding in this regard, prior to which he could put on evidence of mitigating circumstances of an unlimited nature pursuant to subsection (6) of this section, so as to convince the jury that he should not be executed; in addition, the trial court did not err in instructing the jury, pursuant to subsection (5)(e) of this section, that they could find as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest, in view of testimony by an accomplice that defendant and codefendant planned when setting up the robbery that they would leave no witnesses; nor did the court err in admitting evidence of two prior convictions for armed robbery and simple robbery, pursuant to subsection (5)(b) of this section, even though the underlying crimes occurred subsequent to the murder for which defendant was being sentenced, since those crimes had just as much or more bearing on the question of whether he should suffer the death penalty as crimes committed by him prior to the capital offense; finally the court did not err in admitting photographs of the victim and the rope allegedly used by defendant to strangle the victim, since they were relevant to whether the crime was especially heinous, atrocious, or cruel, an aggravating circumstance pursuant to subsection (5)(h) of this section. Leatherwood v. State, 435 So. 2d 645, 1983 Miss. LEXIS 3092 (Miss. 1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (U.S. 1984).

10. —"Especially heinous, atrocious, or cruel."

In a capital murder case in which the State claimed there were hand prints in the smeared red substance on a hog-feed container, the trial court did not err by allowing the State to submit a heinous, atrocious, or cruel aggravating circumstance to the jury. Regardless of whether hand prints or impressions were on the container, sufficient evidence was presented to support the submission of this aggravator. Hutto v. State, 227 So. 3d 963, 2017 Miss. LEXIS 180 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 983, 200 L. Ed. 2d 262, 2018 U.S. LEXIS 1361 (U.S. 2018).

During the sentencing phase of a capital murder trial, the prosecutor's statement was not a call for the jury to consider the heinous, atrocious, and cruel nature of the crime as an aggravating factor, but rather was part of the "story" of the crime as the State perceived it. Pitchford v. State, 45 So. 3d 216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

At his trial for beating to death his former boss's wife in her home, an inmate's U.S. Const. Amend. VIII right to be free from the arbitrary imposition of capital punishment was not violated by the use of the aggravating factor in Miss. Code Ann. § 99-19-101(5)(h) because the trial court elaborated upon the circumstances that could constitute an "especially heinous, atrocious, or cruel" murder in a way that limited the circumstances of such a finding, and direct appellate review ensured that the inmate was not subjected to the aggravating factor on the basis of an instruction that allowed for a finding that the aggravating factor applied outside the limited cases in which the law intended it to be used. Puckett v. Epps, 615 F. Supp. 2d 494, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. 2009), aff'd, 641 F.3d 657, 2011 U.S. App. LEXIS 10158 (5th Cir. Miss. 2011).

In a capital murder case, the especially heinous, atrocious, and cruel aggravator was properly presented to the jury, as it was sufficiently supported by the evidence because: (1) a doctor testified that the victim's death could be attributed to either manual strangulation, a blow to the head, or drowning; (2) the victim suffered multiple bruises about her neck, face, and arms, blunt trauma to her head, and that she aspirated water into her lungs, causing significant cellular damage and edema; (3) the doctor testified that if the victim received the head trauma first, she could have been completely aware of her surroundings during the strangulation and immersion of her head; and (4) the victim's ability to remain conscious after sustaining a lethal wounds had no relevance to the aggravator. King v. State, 960 So. 2d 413, 2007 Miss. LEXIS 317 (Miss. 2007), cert. denied, 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244 (U.S. 2008).

Post-conviction relief was denied in a capital murder case on the issue of whether a circuit court erred by using the aggravating circumstance of "especially heinous, atrocious, or cruel" based on a sufficiency of the evidence; even if it was not barred, the issue was without merit since the victim was beaten, strangled, raped, stabbed, and left to die as her home was set on fire. Howard v. State, 945 So. 2d 326, 2006 Miss. LEXIS 531 (Miss. 2006), cert. denied, 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278 (U.S. 2007).

Evidence that defendant abducted the victim from her home in broad daylight, forcing her to leave her three-year-old son sleeping alone in the house; forced her to drive to a wooded area on the pretext that he was going to deliver her to his partner while he retrieved ransom money from her husband; upon arriving at the wooded area the victim, undoubtedly, realized that there was no partner waiting for defendant; defendant shot the victim in the back of the head and then drove back into town and continued with his plan to extort money from the victim's husband, where for two days he led the husband to believe that his wife was alive and well was sufficient to support the especially heinous aggravator. Jordan v. State, 912 So. 2d 800, 2005 Miss. LEXIS 170 (Miss. 2005).

There was sufficient evidence in the record which would have allowed the jury to find the "especially heinous" aggravator to exist under Miss. Code Ann. § 99-19-101(5)(h) where the victim was ordered to drive to a deserted dirt road at knife point, where she was bound, gagged and raped. Defendant then slit her throat and left the victim to bleed to death in her car while her killer cleaned up after himself and when she attempted to scream for help, defendant shot her in the head. Thorson v. State, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

Following evidence established that an inmate's four murders fit within the limiting definition of "heinous, atrocious, and cruel": (1) he shot one victim four times with two different guns; (2) one victim called out for help, and another pleaded for her children's safety before being shot in the head; (3) two young boys were brutally murdered; (4) the inmate's daughter was shot in the back, but managed to escape the massacre; (5) the inmate told one victim, "I told you I would kill you one of these days"; and (6) he confessed to his wife that he had "just killed a family." Stevens v. State, 867 So. 2d 219, 2003 Miss. LEXIS 822 (Miss. 2003), cert. denied, 543 U.S. 858, 125 S. Ct. 222, 160 L. Ed. 2d 96, 2004 U.S. LEXIS 6409 (U.S. 2004).

In a capital murder case, in upholding defendant's sentence of death as proportionate to the crime, the Supreme Court held that the fact that the victim suffered vaginal injuries, multiple scrapes and bruises about her body, and two stab wounds satisfied the Miss. Code Ann. § 99-19-101(5)(h) requirement that the crime be "especially heinous, atrocious, or cruel." Howard v. State, 853 So. 2d 781, 2003 Miss. LEXIS 343 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113, 2004 U.S. LEXIS 1327 (U.S. 2004).

Evidence was sufficient to establish that the murder of two victims was especially heinous, atrocious, or cruel where (1) one victim was shot in the head which blew out his eye socket, (2) he did not die from this first shot, but began to severely bleed from his wound, (3) he left his car and was forcibly walked a short distance from the road, (4) he was then stuffed into the trunk of his car, only to be dumped out and shot through his temple, this being the fatal shot, (5) he was then dragged into the woods, and (6) the other victim, the two year old child of the first victim, was then forcibly led into the woods and shot in the head as he leaned over his father. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel," but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in Maynard v. Cartwright (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, Clemons v. Mississippi (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and Maynard and Clemons did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in Godfrey v. Georgia (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

Where, in sentencing hearing which ended in jury determination that accused should receive death penalty, court instructed jury that, in considering whether murder was "especially heinous, atrocious, or cruel" within meaning of statutory aggravating factors, "heinous" meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile," and "cruel" meant "designed to inflict a high degree of pain with indifference to, or even enjoyment of, a suffering of others," U.S. Supreme Court reversed state Supreme Court judgment insofar as it relied on "heinous, atrocious, or cruel" aggravating factor, and remanded case for further consideration, holding that limiting instruction used by trial court was not constitutionally sufficient. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

State sentencing statute providing for finding of aggravating and mitigating circumstances by trial court instead of by jury was valid; "heinous, cruel or depraved" aggravating circumstance does not fail to channel sentencer's discretion in violation of Eighth and Fourteenth Amendments because State Supreme Court has sought to give substance to operative terms of statute and its construction meets constitutional requirements; and contention that "heinous, cruel or depraved" circumstance was applied arbitrarily and, as applied, did not distinguish accused's case from others in which death sentence was not imposed, was in effect challenge to proportionality review of state's Supreme Court and would be rejected. Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511, 1990 U.S. LEXIS 3462 (U.S. 1990), overruled in part, Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556, 2002 U.S. LEXIS 4651 (U.S. 2002).

It was not improper for aggravating circumstance described in subsection (5)(h) of this section ("especially heinous, atrocious, or cruel" offense) to be submitted to jury without limiting instruction, where defendant, during course of robbery, had ordered grocery store clerk to kneel and had shot him in head from distance of approximately 3 or 4 feet prior to leaving store, particularly where this circumstance was one of several statutory aggravating circumstances relied on by State and found by jury. Evans v. Thigpen, 631 F. Supp. 274, 1986 U.S. Dist. LEXIS 27843 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss. 1987).

The Mississippi Supreme Court's construction of the provision of subsection (5)(h) of this section, that one aggravating circumstance to be considered by a jury in the sentencing phase of a capital murder trial is whether the murder was especially heinous, atrocious, or cruel, eliminated the risk that the death penalty would be inflicted in an arbitrary and capricious manner. Gray v. Lucas, 685 F.2d 139, 1982 U.S. App. LEXIS 25900 (5th Cir. Miss. 1982), cert. denied, 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815, 1983 U.S. LEXIS 4453 (U.S. 1983).

Subsection (5)(h) of this section was not unconstitutionally vague in its provision for the imposition of the death penalty when the offense committed was especially heinous, atrocious or cruel, since Mississippi courts had consistently applied a limiting construction of this factor. Gray v. Lucas, 677 F.2d 1086, 1982 U.S. App. LEXIS 18532 (5th Cir. Miss. 1982), cert. denied, 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815, 1983 U.S. LEXIS 4453 (U.S. 1983).

Instruction on aggravator of committing murder in order to avoid arrest was supported in capital sentencing proceeding by evidence that victim was still alive after rape and that defendant then stuffed defendant's panties down her throat, and by evidence that defendant mutilated victim's genital area after she died so that authorities would think a "sex fiend" had committed crime. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Instruction on especially heinous, atrocious, or cruel aggravating circumstance at capital sentencing proceeding was not unconstitutionally vague or overbroad, where aggravator was defined as involving a conscienceless or pitiless crime which is unnecessarily torturous to victim. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Photographs can provide graphic proof of statutory aggravating circumstance that capital offense was heinous. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Fifteen photographs of murder victim gave evidentiary value to aggravating circumstance of acts of heinous, atrocious, and cruel nature of murder, and, thus, were admissible to show aggravating circumstances. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Instruction on "heinous, atrocious, or cruel" aggravating factor was supported by evidence that defendant stabbed victim 31 times because "it felt good," that he left her lying in a pool of her own blood, that she gasped and gurgled while blood filled one of her lungs, and that she eventually bled to death some minutes later. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Instruction on aggravating factor for death penalty purposes that capital offense was especially heinous, atrocious or cruel was not unconstitutionally vague, as instruction set out definitions of the terms, and provided examples. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Instruction on aggravating factor for death penalty purposes that murder was especially heinous, atrocious or cruel was not inadequate on ground that it failed to speak exclusively to defendant's moral culpability, allegedly told jury that defendant had in "fact" used method of killing that caused serious mutilation, or because "heinous, atrocious, or cruel" is disjunctive rather than conjunctive. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

At resentencing phase of capital murder trial, photographs portraying stab wound to chest and heart of victim and depicting the area of victim's vagina and anus, which had been excised, were relevant to assist pathologist in explanation to jury and assist jury in understanding nature and extent of the injuries, and had probative value in establishing beyond a reasonable doubt the death penalty aggravating circumstance that the murder was especially heinous, atrocious or cruel. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Photographs proving cruelty inflicted on victim were relevant to the death penalty aggravating circumstance that murder was especially heinous, atrocious or cruel even though the fact of killing, the nature and extent of victim's wounds, and the cause of death were admitted and not in dispute. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Capital sentencing instruction concerning "especially heinous, atrocious, or cruel" aggravating circumstance adequately channelled jury's discretion and thus was not unconstitutional, despite fact that part of instruction was invalid under Shell. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Evidence, including number of wounds, number of weapons used, and victim's prolonged death, supported finding of "especially heinous, atrocious, or cruel" aggravating circumstance in sentencing of defendant for capital murder. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

The "specially heinous" aggravator does not violate Eighth Amendment. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

The "specially heinous" aggravator does not violate Fourteenth Amendment. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury was not entitled to consider aggravating factor in death penalty case that murder committed by defendant was especially heinous, atrocious, or cruel; no evidence was presented to jury as to how crime was actually committed, and even if cause of death was strangulation, as pathologist speculated, there was no evidence how strangulation was carried out and no evidence of any additional acts to set crime apart from norm of capital felonies as conscienceless, pitiless, or unnecessarily torturous. Taylor v. State, 672 So.

2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Aggravating circumstance in death penalty case that murder was especially heinous, atrocious, or cruel may be used only when jury is instructed as to its meaning in manner which will channel jury's discretion. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Autopsy photographs may be admitted during sentencing phase of capital murder prosecution on issue of whether crime was especially heinous, atrocious or cruel, even if photographs were inadmissible during guilt phase. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 649 So. 2d 1256, 1994 Miss. LEXIS 496 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422, 1995 U.S. LEXIS 7828 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

A circuit court did not err when it allowed the prosecution to present a photograph of a substantial part of the body of the victim in the penalty phase of a capital murder prosecution, where the photograph was carefully cropped so as to reflect only the back of the victim's body, there was nothing gruesome about the photograph, prosecution witnesses testified that the photograph fairly and accurately depicted the location of the entrance wound on the lower back, and the photograph was presumably offered as evidence that the homicide was "espe-

cially heinous, atrocious or cruel." Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

Submission of aggravating circumstances of heinous, atrocious, and cruel crime did not deny defendant his rights under Constitution of Mississippi and United States; although defendant contended there was no evidence supporting this aggravating circumstance and that evidence was uncontroverted that victim was shot dead as soon as he opened door to his house, state argued that there was no evidence that victim was dead or even unconscious when later shots were fired. Lockett v. State, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

Expert testimony on pain involved in death of murder victim by strangulation or suffocation is admissible in penalty phase of capital murder prosecution on issue of whether killing was especially heinous, atrocious, or cruel. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

In order for jury considering whether to impose death penalty on basis of aggravating circumstances "especially heinous, atrocious, or cruel" to be adequately guided in deliberation, jury should be informed of construction given that language by Mississippi Supreme Court. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

Testimony in a capital murder prosecution was sufficient for the jury to find that the infliction of the wounds was "unnecessarily tortuous" and was "pitiless", so that it was properly found to be "especially heinous, atrocious or cruel" within the meaning of subsection (5)(h) of this section; moreover, the jury was properly permitted to consider as a aggravating circumstance, under subsection (5)(d) of this section, that the murder was committed in the course of the commission of a robbery; finally, upon careful examination of the sentencing phase in the manner required by § 99-19-105, the Supreme Court would find that defendant's execution would be consistent and even-handed with all death penalty cases affirmed since 1976. Billiot v. State, 454 So. 2d 445, 1984 Miss. LEXIS 1777 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, 1985 U.S. LEXIS 171 (U.S. 1985).

Where the undisputed evidence in a prosecution for capital murder indicated that the police officer victim and his companion were dressed in police uniforms and had driven up in a plainly marked police department vehicle, that the area was lighted, that defendant could see all these circumstances, and that defendant nevertheless pointed a shotgun directly at a police officer and fired two times, causing his death, the aggravating circumstance of "especially heinous, atrocious, and cruel" was proper under this section. Edwards v. State, 441 So. 2d 84, 1983 Miss. LEXIS 2507 (Miss. 1983).

In the sentencing phase of a capital murder case, the trial court properly admitted photographs into evidence which showed certain physical evidence in a robbed store, including the victim's body. Additionally, cross-examination of defendant in the sentencing phase concerning his guilty plea in an attempt to refute defendant's claim that the homicide was not intentional was not improper impeachment and did not constitute reversible error, since it had relevance on the issue of whether or not the homicide was especially heinous, atrocious or cruel. Gilliard v. State, 428 So. 2d 576, 1983 Miss. LEXIS 2437 (Miss.), cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179, 1983 U.S. LEXIS 1737 (U.S. 1983), disapproved, Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, 1986 U.S. LEXIS 150 (U.S. 1986).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

This section does not impose cruel and unusual punishment. Nor does it unconstitutionally shift the burden of proof during the sentencing phase by requiring a defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed, since there is no requirement that the jury impose death when aggravating circumstances are shown and mitigating circumstances are not; proof of aggravating circumstances may still be found insufficient by the jury to require death and the state still carries the burden of showing not only aggravating circumstances, but that the circumstances are sufficient to warrant death. Furthermore, this section is not unconstitutional for failing to provide guidelines for appellate review, since a comparison with other cases where the death penalty was upheld is constitutionally adequate and comparison with cases of life imprisonment is not required; the use of the "especially henious, atrocious, or cruel" aggravating circumstances is not vague, overbroad or violative of the Fifth Amendment, and the statute does not unconstitutionally allow unlimited evidence at the sentencing stage, since evidence is limited to the aggravating circumstances listed in the statute. Coleman v. State, 378 So. 2d 640, 1979 Miss. LEXIS 2542 (Miss. 1979).

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. Washington v. State, 361 So. 2d 61, 1978 Miss. LEXIS 2344 (Miss. 1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2016, 60 L. Ed. 2d 388, 1979 U.S. LEXIS 1606 (U.S. 1979).

11. —"Avoiding or preventing lawful arrest or effecting escape from custody."

Trial court did not err by instructing the jury that the capital offense occurred for the purpose of avoiding or preventing arrest as an aggravating factor where defendant knew the murder victims, the murder weapon was never found, a shoe box was found at his girlfriend's house, cash was found hidden in his headboard, and he gave conflicting statements to police regarding his whereabouts on the morning of the murders. Flowers v. State, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, — U.S. —, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Substantial evidence supported instructing the jury on the aggravating circumstance that defendant's capital offense was committed for the purpose of avoiding or preventing a lawful arrest because he had continued to shoot the victim after she had given him her money and there was sufficient circumstantial evidence from which it could be reasonably inferred that a substantial reason for the killing was to conceal defendant's identity in order to avoid apprehension. Keller v. State, 138 So. 3d 817, 2014 Miss. LEXIS 89 (Miss. 2014), cert. denied, 574 U.S. 1159, 135 S. Ct. 1397, 191 L. Ed. 2d 371, 2015 U.S. LEXIS 1353 (U.S. 2015).

Defendant's sentence of death after being convicted for capital murder during the commission of a robbery was proper because it could have been reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to cover his tracks so as to avoid apprehension and eventual arrest by authorities. Therefore, the trial court did not abuse its discretion in allowing the avoiding-arrest aggravator to be included in two jury instructions, Miss. Code Ann. § 99-19-101(5)(e). Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

Inmate's U.S. Const. Amend. XIV due process rights and U.S. Const. Amend. VIII right to be free from the arbitrary imposition of capital punishment was not violated by the use of the aggravating factor in Miss. Code Ann. § 99-19-101(5)(e) where the evidence showed that the murder victim recognized the inmate, who had worked for the victim's husband six months earlier, the inmate ran from the scene and hid in the woods for two days, emerging only when he was spotted by a helicopter, and the inmate had discarded his bloodstained clothing before going into the woods. Puckett v. Epps, 615 F. Supp. 2d 494, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. 2009), aff'd, 641 F.3d 657, 2011 U.S. App. LEXIS 10158 (5th Cir. Miss. 2011).

Post-conviction relief was denied in a capital murder case based on the argument that the aggravator of "avoiding or preventing a lawful arrest or effecting an escape from custody" aggravator was given because it was procedurally barred; even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison. Howard v. State, 945 So. 2d 326, 2006 Miss. LEXIS 531 (Miss. 2006), cert. denied, 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278 (U.S. 2007).

"Avoiding arrest" was properly submitted as an aggravating factor under Miss. Code Ann. § 99-19-101(5)(e) in defendant's capital murder case because defendant indicated in his statement that after raping the victim, he wiped her car down to remove any traces of fingerprints that he might have left on the car, then asked the victim if she would tell anyone what had happened. After indicating that she would not, defendant, not believing her answer, slit her throat, then removed several items from the victim's car and threw them into the woods to make it appear as if someone else was responsible for the crime. Thorson v. State, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

Where a jury returned a verdict of capital murder with avoiding arrest as a aggravating factor, and the verdict stated "the offense was committed with the purpose of covering up and hiding evidence," there was no doubt that the jury found the "avoiding arrest" aggravator to exist under Miss. Code Ann. § 99-19-101(5)(e), and the verdict form complied with Miss. Unif. Cir. & County Ct. Prac. R. 3.10. Thorson v. State, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

In a capital murder case, a court properly submitted to the jury the aggravating circumstances that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest where there was sufficient evidence from which it could be reasonably inferred that a substantial reason for killing the victim was to conceal the identity of the killer or killers so as to avoid apprehension and eventual arrest by authorities. Scott v. State, 878 So. 2d 933, 2004 Miss. LEXIS 650 (Miss. 2004).

Evidence was sufficient to justify an instruction on avoiding or preventing a lawful arrest where (1) the victim's body was covered with debris and hidden under the flooring of an abandoned house in a remote area, (2) her chest was burned, impeding the investigation into the cause of her death, (3) there was evidence that the defendant knew the victim and that, shortly after the disappearance, he had his hair cut short, and (4) the defendant had prior convictions for sex crimes. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S.

2000), in part, 2011 Miss. LEXIS 50 (Miss. Jan. 20, 2011).

The court would reject the contention that, because every murder necessarily eliminates a witness to that crime, the avoiding arrest aggravator must be given with a limiting instruction channeling the jury's focus to those situations where there is specific evidence demonstrating that one of the purposes behind the killing was the killer's desire to avoid detection and apprehension for an underlying crime. Wiley v. State, 750 So. 2d 1193, 1999 Miss. LEXIS 191 (Miss. 1999), cert. denied, 530 U.S. 1275, 120 S. Ct. 2742, 147 L. Ed. 2d 1007, 2000 U.S. LEXIS 4536 (U.S. 2000).

Evidence was sufficient to establish the "avoiding arrest" aggravating factor where the victims in the case knew the defendant and, furthermore, the defendant made efforts to dispose of and/or conceal the evidence of his crime. Wiley v. State, 750 So. 2d 1193, 1999 Miss. LEXIS 191 (Miss. 1999), cert. denied, 530 U.S. 1275, 120 S. Ct. 2742, 147 L. Ed. 2d 1007, 2000 U.S. LEXIS 4536 (U.S. 2000).

It was reversible error for the court to allow the introduction into evidence during the sentencing phase testimony that defendant marked gang signs on the jail cell wall, notwithstanding the assertion that the testimony was relevant to show whether the defendant killed the victim to avoid arrest. There was no basis for the admission of any threat evidence on the factor of avoiding arrest. Walker v. State, 740 So. 2d 873, 1999 Miss. LEXIS 184 (Miss. 1999).

Evidence was sufficient to establish that a murder was intended to avoid arrest where statements by the defendant showed that he shot the victim in an effort to avoid getting caught, and there was also the compelling evidence that the defendant and his coperpetrator burned the vehicle stolen from the victim. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

Evidence was sufficient in capital murder prosecution to prove penalty phase aggravating circumstance that capital offense was committed for purpose of avoiding or preventing lawful arrest; defendant's friend testified that defendant shot victim as victim attempted to call police because victim would know his face and, at point defendant shot victim, defendant could have walked away without further interference from victim. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether defendant shot victim in order to avoid or prevent lawful arrest; record was devoid of any reference showing that defendant was disguised when he entered or left store at which shooting took place, and fellow prison inmate claimed that defendant told him that he shot victim because he believed she was stalling and seemed like she was reaching for something. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

If there is evidence from which it may be reasonably inferred that substantial reason for killing was to conceal identity of killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for court to allow jury to consider aggravating circumstance of avoiding or preventing lawful arrest. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder for purpose of avoiding or preventing lawful arrest; there was no evidence that desire to avoid apprehension and arrest was a substantial reason for victim's murder. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Prosecution in capital murder case could establish aggravating factor of avoiding arrest, by introducing testimony and photograph of police crime expert showing that body of victim had been burned in hands and pubic area, in order to preclude identification of victim by fingerprints or of perpetrator through pubic hair combings, even though defendant claimed that burning taking place after murder had been completed did not show that murder was undertaken to cover up earlier crimes including sexual assault; "avoiding arrest" aggravator extended also to avoiding arrest for killing. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

"Avoiding arrest" aggravating factor was properly submitted to jury in penalty phase of capital murder case, even though defendant claimed that arrest avoidance was inherent in every murder, as it by definition eliminated one of the possible witnesses and that further limiting instruction was required to channel jury's focus on situations in which there is specific evidence demonstrating that one of the purposes beyond the killing was desire to avoid detection and apprehension for underlying crime. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Evidence supported avoidance of arrest as aggravating factor in penalty phase of capital murder case; defendant began asking victim if she wanted to live or die from moment that she, defendant and accomplice arrived at lake, he expressly informed accomplice they were going to have to kill victim, after victim was dead defendant doused body with gasoline and burned victim, with special emphasis on hands and pubic area so as to preclude identification through fingerprints, fiber and pubic hair comparisons. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

The aggravating circumstance that the capital murder was committed for the purpose of "avoiding or preventing a lawful arrest" does not apply only to murders of law enforcement officers; thus, the question of whether this aggravating factor should be submitted to the jury does not depend on whether the victim was a law enforcement officer but whether the facts and circumstances prove that avoiding lawful arrest was a motive in the killing. Chase v. State, 645 So. 2d 829, 1994 Miss. LEXIS 116 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282, 1995 U.S. LEXIS 3828 (U.S. 1995).

The statutory aggravating circumstance that "the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" is properly submitted to the jury if evidence exists from which the jury could reasonably infer that concealing the killer's identity, or covering the killer's tracks to avoid apprehension and arrest, was a substantial reason for the killing. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

Where an indictment charges a robbery/murder capital offense and robbery is designated as an aggravating circumstance, pecuniary gain should not be used as an aggravating circumstance unless clearly supported by the evidence. Likewise, the aggravating circumstance that the capital offense "was committed for the purpose of avoiding lawful arrest," should not be used unless clearly supported by the evidence. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

12. —Other convictions.

In a capital murder case, the trial court did not err by allowing the State to submit a prior violent felony aggravating circumstance to the jury. Defendant admitted that his Alabama conviction for sexual abuse in the first degree contained an element of violence, as an element of the Alabama crime is forcible compulsion. Hutto v. State, 227 So. 3d 963, 2017 Miss. LEXIS 180 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 983, 200 L. Ed. 2d 262, 2018 U.S. LEXIS 1361 (U.S. 2018).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the felony murder aggravator genuinely narrowed the class of defendants eligible for the death penalty under Miss. Code Ann. § 99-19-101(5)(d). Loden v. State, 971 So. 2d 548, 2007 Miss. LEXIS 558 (Miss. 2007), cert. denied, 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568 (U.S. 2008).

Court rejected defendant's claim that evidence of prior bad acts was improperly admitted in violation of Miss. R. Evid. 404(b) because defense counsel never objected and the prior bad act evidence was admitted in rebuttal after the defense opened the door to defendant's character. Also the court rejected defendant's claim that the prior bad act evidence was not relevant to any of the statutory aggravating factors enumerated in Miss. Code Ann. § 99-19-101(5) because § 99-19-101(1) did not limit the evidence that could be presented at the sentencing phase to evidence relevant to the aggravating circumstances, but rather the State was allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument. Hodges v. State, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

Where an inmate was previously convicted in another state of rape, and consent was not an issue, the inmate's prior crime must be viewed as one of violence sufficient to be used as an aggravating circumstance pursuant to Miss. Code Ann. § 99-19-101(5)(b) Hughes v. State, 892 So. 2d 203, 2004 Miss. LEXIS 1355 (Miss. 2004), cert. denied, 545 U.S. 1130, 125 S. Ct. 2935, 162 L. Ed. 2d 870, 2005 U.S. LEXIS 4906 (U.S. 2005).

In order for 12 members to unanimously agree that a statutory aggravator under Miss. Code Ann. § 99-19-101 exists, they must be able to know about the crime that took place earlier, even if that crime indicates that the defendant has the propensity to commit crimes of violence wielding the same type weapon; the trial court is not limited to submitting only an indictment which notes that the defendant committed armed robbery previously, and that armed robbery is a crime involving the use or threat of violence to the person. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

One who is under a suspended sentence is "under sentence of imprisonment," an aggravating circumstance listed at Miss. Code Ann. § 99-19-101(5)(a) for one having committed a capital offense. Brown v. State, 798 So. 2d 481, 2001 Miss. LEXIS 196 (Miss. 2001).

Miss. R. Evid. 803(22) did not prohibit the introduction in a murder trial the defendant's prior conviction for aggravated sexual battery in support of the aggravating circumstance that he was previously convicted of a felony involving the use of threat of violence to the person since the prior conviction was not introduced to prove any fact essential to sustain that judgment but was, instead, introduced solely to prove the conviction. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

Under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, the reversal of the defendant's New York conviction required a re-examination of the Mississippi death sentence because (1) the reversal of the conviction made evidence thereof irrelevant to the Mississippi sentencing decision, and the fact that the accused had served time in prison did not change this; (2) the use of the New York conviction in the Mississippi sentencing hearing was prejudicial, especially given the Mississippi prosecutor's comments; (3) vacating a death sentence based on a prior conviction when that conviction is set aside does not undermine state capital sentencing procedures, since a rule that regularly gives a defendant the benefit of such post-conviction relief is not arbitrary or capricious; and (4) assuming that a death sentence in this case would be proper under Mississippi law even absent evidence of the New York conviction, that fact would not be determinative of this case, since (a) the Mississippi appellate curt had expressly-and correctly-refused to rely on harmless-error analysis because of the prosecutor's reliance on this particular aggravating circumstance, and of the prosecutor's reliance on this particular aggravating circumstance, and (b) the sentencing jury in this case had not merely considered an invalid aggravating circumstance supported by otherwise admissible evidence, but was allowed to consider evidence which was materially inaccurate. Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575, 1988 U.S. LEXIS 2657 (U.S. 1988).

Conviction of assault to commit rape occurring 20 years prior to capital murder trial may not be considered as aggravating circumstance in determining whether to impose death penalty when the conviction is thereafter reversed. Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575, 1988 U.S. LEXIS 2657 (U.S. 1988).

Evidence of a conviction subsequent to crime for which person is being sentenced may be used as proof of aggravating circumstances. Wells v. State, 698 So. 2d 497, 1997 Miss. LEXIS 258 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125, 1998 U.S. LEXIS 1059 (U.S. 1998).

Jury was not improperly required to weigh same facts twice against mitigating evidence, in violation of double jeopardy clause, when sentencing court allowed defendant's conviction for capital murder of second victim to be considered as an aggravating circumstance; court was not faced with one action for which defendant could be prosecuted on either underlying crime or capital murder, but rather, there were actually two murder victims–the product of two separate criminal actions by defendant. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Conviction for capital murder of one victim was admissible as aggravator at sentencing trial for killing of another victim. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Fact that, at original sentencing trial in case, neither of defendant's convictions at guilt trial for capital murder of victims was final and that only reason that conviction for killing of second was final at time of resentencing trial for killing of first victim was that original death sentence was reversed and case remanded for resentencing did preclude use of conviction for killing second victim as aggravator at resentencing on conviction for killing of first victim. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Court properly refused instruction that aggravating factor that defendant had killed second victim did not allow jury to punish defendant for that killing where counsel would not agree to redaction of additional sentence stating that punishment assessed against defendant "will be served in addition to his punishment for the capital murder" of second victim, as that was speculation. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Certified copy of indictment and judgment as well as testimony of police officers present during prior incident involving gun was sufficient to establish aggravating circumstance during sentencing phase of capital murder case that defendant committed prior felony involving use or threat of violence to person, even if gun defendant had used was inoperable and separate kidnapping charges against him were dropped. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Rules of impeachment found in Rule of Evidence concerning details of previous conviction were inapplicable where state was not seeking to impeach defendant's credibility with evidence of prior conviction but was attempting to prove beyond reasonable doubt the death penalty aggravator, in murder prosecution, that defendant was previously convicted of a felony involving the use or threat of violence to the person. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

As a general rule, in sentencing phase of capital case, prior conviction of another capital offense or of felony involving use or threat of violence to the person is admissible as an aggravating circumstance to be considered by jury in determining punishment. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Prosecutor's comment on capital murder defendant's voluntary drug use to rebut mitigating circumstance of no significant history of criminal activity did not violate defendant's right to fair trial, where defendant placed his prior criminal activity at issue. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Individual can have prior conviction involving use of threat or violence and yet not be under sentence of imprisonment, and individual can be under sentence of imprisonment and yet not have prior conviction involving use of threat or violence, so that both aggravating circumstances may be used, even when they are based on the same offense. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment charging defendant with aggravated assault was best evidence to prove that defendant had been convicted of felony involving use of threat or violence, provided that it was properly certified. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment which bore signature of county clerk who attested to its origins was properly certified and thus admissible in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment which led to defendant's conviction for aggravated assault was relevant in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence and to prove that defendant was under sentence of imprisonment at the time of the murder with which he was charged. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Finding of aggravating factor in death penalty case that defendant had been previously convicted of felony involving use or threat of violence was supported by evidence that defendant had previously been convicted of murder and aggravated assault, even though aggravated assault conviction had occurred after murder for which defendant was being sentenced to death. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Certified copy of indictment and judgment and testimony of police officers present at incident justified use of capital murder defendant's prior violent felony as aggravating circumstance, even if gun used during incident was inoperable and separate kidnapping charges were dropped. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

"Pen packs" detailing defendant's prior offense were relevant during penalty phase of capital murder trial to prove 2 aggravating circumstances, that defendant was previously convicted of another capital offense or felony involving use or threat of force and that defendant committed capital offense while under sentence of imprisonment, where such evidence was not offered to impeach defendant or any of his witnesses. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Indictment contained in defendant's "pen pack" was relevant and admissible during penalty phase of capital murder case to show that defendant's previous escape was crime of violence for purposes of statutory aggravating factor. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Suspended sentence for grand larceny conviction that capital murder defendant was serving at time of murder was "sentence of imprisonment" for purposes of aggravating circumstances set forth under capital sentencing statute. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Robbery is per se crime of violence, for purposes of aggravating circumstances set forth under capital sentencing statute. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

A circuit court did not err in admitting evidence of the defendant's 10 prior felony convictions in the penalty phase of a capital murder prosecution, even though none of the convictions was "a felony involving the use or threat of violence to the person," where the use of the prior convictions was in the nature of rebuttal evidence after the defendant produced a number of witnesses who testified regarding his past, since the convictions were as much a part of the defendant's life story as the proof he offered himself. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

The aggravating circumstance of "previous conviction of a felony involving the use or threat of violence to the person" was valid, even though the defendant had been awarded damages in the amount of $15,000 in connection with the underlying prior conviction as the result of a successful civil suit against a police officer who shot the defendant. A trial court cannot retry all prior convictions, and therefore a trial judge is not required to look beyond a prior conviction which is valid on its face. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

In the sentencing phase of a capital robbery/murder prosecution, convictions for armed robberies committed by the defendant after the robbery/murder were admissible as aggravating circumstances. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

Proof of prior convictions may be made by certified copies of judgments of convictions. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Even if the trial judge improperly admitted evidence of the defendant's prior armed robbery conviction during the sentencing phase of his trial, the sentence of death would be affirmed where there were 3 other aggravating circumstances found by the jury pursuant to subsection (5) of this section. Cabello v. State, 524 So. 2d 313, 1988 Miss. LEXIS 92 (Miss. 1988).

Trial court did not err in submitting to jury aggravating circumstance of murder committed while under sentence of imprisonment, despite argument of defendant that Texas conviction should be viewed as juvenile disposition since defendant was under 18 at time he received sentence and that probated sentence is not "sentence under imprisonment" within ambit of subsection (5)(a) of this section. Nothing in statutory language requires that aggravating circumstance of sentence of imprisonment be pursuant to

Mississippi conviction, and when person has been convicted and placed on probation, such sentence is "sentence under imprisonment." Lockett v. State, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

Murder defendant could not complain of state's instruction which, although it impliedly allowed the jury to consider his prior burglary conviction, it also allowed the jury to consider the fact that his prior record was non-violent as a mitigating factor, and the instruction tracked § 99-19-101 in listing the mitigating factors which the jury could consider. Irving v. State, 498 So. 2d 305, 1986 Miss. LEXIS 2518 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826, 1987 U.S. LEXIS 2032 (U.S. 1987).

Prior conviction for rape, crime of violence to person, is admissible during sentencing phase of capital murder prosecution. Johnson v. State, 476 So. 2d 1195, 1985 Miss. LEXIS 2257 (Miss. 1985).

Admission, during penalty phase of capital murder prosecution, of papers which show that defendant served time for aggravated assault conviction but which do not reveal crime for which defendant's probation was revoked is not ground for reversal of death sentence where inference that defendant has committed another unnamed crime could not have prejudiced him in any way differently from his own admission from witness stand of convictions for aggravated assault, grand larceny, and cattle theft. Gray v. State, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Mug shot is admissible in penalty phase of capital murder prosecution to prove that defendant has been convicted of prior offense under another name; evidence consisting of mug shots and prior statements of defendant regarding use of another name and of copies of bill of information and of court minutes showing conviction under other name is sufficient to permit jury to consider prior conviction as aggravating circumstance in penalty phase of capital murder prosecution. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

Prosecuting attorney adequately discloses to defense counsel intent to introduce prior convictions during penalty phase of capital murder prosecution where defense counsel is given copy of defendant's rap sheet and is informed that state will be engaged in ongoing effort to obtain record of prior conviction. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

Limitation in this section on use in sentencing phase of capital case of prior convictions for purpose of establishing aggravating circumstances in no way alters established rule of evidence (§ 13-1-13) under which defendant who testifies may have credibility impeached by prior convictions, whether misdemeanors or felonies. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

In a prosecution for capital murder the trial court properly admitted evidence of defendant's suspended sentence for a nonviolent crime as proof that the capital murder was "committed by a person under sentence of imprisonment" pursuant to subsection (5)(a) of this section, since the statute is intended to cure recidivism, and enhanced punishment relates to the conduct underlying the previous convictions. Evans v. State, 422 So. 2d 737, 1982 Miss. LEXIS 2269 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 314, 1983 U.S. LEXIS 4708 (U.S. 1983).

In a prosecution for capital murder, the trial court did not err in allowing the state to present evidence of convictions secured subsequent to the indicted offense upon a retrial of the case, which evidence was introduced during the sentencing phase of the retrial; under this section, evidence of a conviction secured between the time of the capital offense and the time of trial is admissible to show aggravating circumstances. Nor was it error to use the same jury at both the guilt phase and the sentencing, since this section provides for the use of the same jury, and since there was no objection to the procedure or request for another jury to hear the sentencing phase. Reddix v. State, 381 So. 2d 999, 1980 Miss. LEXIS 1845 (Miss.), cert. denied, 449 U.S. 986, 101 S. Ct. 408, 66 L. Ed. 2d 251 (U.S. 1980).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice (§ 99-19-105), and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

In a prosecution for capital murder, the trial court properly admitted evidence of a conviction for armed robbery that was entered after the indictment for murder as evidence of aggravating circumstances in the sentencing phase of the trial. Under this section, a conviction entered against a defendant between the time that a capital offense was committed and the time of trial may be admitted into evidence as an aggravating circumstance. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

A prior conviction of another capital offense or of a felony involving the use or threat of violence to the person is admissible at the punishment stage of a trial for a capital crime as an aggravating circumstance to be considered by the jury in determining punishment. Gray v. State, 351 So. 2d 1342, 1977 Miss. LEXIS 1951 (Miss. 1977).

13. —Contemplation that lethal force would be used.

Where the jury finds § 99-19-101(7)(d) "contemplation" alone, the jury is required to find that the defendant had some sort of "pre-crime," "contingent intent," or plan that establishes a mental state beyond mere foreseeability or reckless indifference to human life; a jury instruction that fails to properly instruct the jury on the mental state required, is erroneously given. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

There was sufficient evidence from which the jury could reasonably conclude that the defendant contemplated the use of lethal force where there was evidence placing the defendant in the victims' home on the night of their murders, and there was physical evidence that the victims were bound. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In a prosecution for capital murder committed while engaged in the commission of armed robbery, the evidence was sufficient to support the jury's finding pursuant to subsections (3)(a) and (7)(d) of this section that the defendant "contemplated that lethal force would be used" where the defendant's confession revealed that he willingly and knowingly accompanied his codefendant, who committed the killing, to a store with the specific intent to commit a robbery, the defendant was aware of the fact that the codefendant brought along a shotgun with shells which he stated was needed "for security," the defendant watched as the codefendant entered the store with the loaded shotgun, and the defendant then entered the store at the codefendant's request. Abram v. State, 606 So. 2d 1015, 1992 Miss. LEXIS 448 (Miss. 1992), overruled in part, Foster v. State, 961 So. 2d 670, 2007 Miss. LEXIS 315 (Miss. 2007), overruled in part, Holly v. Mississippi, 2011 U.S. App. LEXIS 24853 (5th Cir. Miss. Dec. 13, 2011).

In a prosecution for murder while engaged in the crime of robbery, the jury could reasonably have found that the defendant intended the killings and intended that lethal force be used, for purposes of imposing the death penalty, where the defendant actually participated in the robbery with his accomplice and was present in some role while both murders were committed. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A sentence of death may be upheld only if the record contains legally sufficient evidence that the jury may have found beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed. White v. State, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

14. Weighing of aggravating and mitigating factors.

Inmate's U.S. Const. Amend. XIV due process rights and U.S. Const. Amend. VIII right to be free from the arbitrary imposition of capital punishment was not violated by the failure of the state trial court to require that the jury specifically find that the aggravating circumstances under Miss. Code Ann. § 99-19-101(5) outweighed the mitigating circumstances under § 99-19-101(6), as United States Supreme Court precedent held that allowing the imposition of capital punishment when the aggravating and mitigating factors were in equipoise was not unconstitutional under similar statutes from Kansas and Arizona. Puckett v. Epps, 615 F. Supp. 2d 494, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. 2009), aff'd, 641 F.3d 657, 2011 U.S. App. LEXIS 10158 (5th Cir. Miss. 2011).

15. Kill, attempt to kill, or intend to kill.

Trial court did not violate petitioner death row inmate's rights under the Sixth and Fourteenth Amendments by excluding the testimony of a defense expert during the guilt phase of the trial to negate the finding of intent, because the jury did find intent in the sentencing phase, after hearing the same evidence and the states had the responsibility of defining the elements of crime, including mens rea, and neither diminished capacity nor voluntary intoxication were defenses to crimes in Mississippi; under Miss. Code Ann. § 99-19-101(7), the jury found the inmate had intended to kill the victims. Stevens v. Epps, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), aff'd, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Assuming arguendo that defendant's argument that the sentencing instruction was improper as it only required the jury to find that he contemplated that lethal force would be used, defendant could not demonstrate the requisite cause and actual prejudice to overcome the procedural bar due to raising the issue for the first time on appeal as the jury clearly found that defendant intended that the victim be killed. Walker v. State, 863 So. 2d 1, 2003 Miss. LEXIS 534 (Miss. 2003), cert. denied, 543 U.S. 842, 125 S. Ct. 281, 160 L. Ed. 2d 68, 2004 U.S. LEXIS 5982 (U.S. 2004).

The jury was properly permitted to consider the death penalty since there was evidence both that the defendant killed the victim and that he intended to do so where (1) the defendant told a witness that "I've killed and I'll kill again," and (2) the jury saw pictures of the victim and heard the testimony of the pathologist, showing extensive trauma, how she was tied up, and how her mouth was taped. Humphrey v. State, 759 So. 2d 368, 2000 Miss. LEXIS 101 (Miss. 2000).

Evidence was sufficient as a matter of law to prove that the defendant either actually killed the victim, intended that a killing take place, or contemplated the use of lethal force where the record revealed (1) that the defendant was more than likely the instigator of the robbery that led to the victim's death, as well as the one who planned it, and (2) that both defendants were armed on the day of the robbery and that the defendant knew that the codefendant had a gun. Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

A verdict contained an individual finding that the defendant actually killed and intended to kill the victim and that he contemplated that lethal force be employed, notwithstanding that the verdict used the word "defendants," rather than "defendant," where the verdict stated the required finding "as to the defendant." Smith v. State, 724 So. 2d 280, 1998 Miss. LEXIS 589 (Miss. 1998).

Though jury was required to find existence of each of the death penalty aggravating circumstances beyond a reasonable doubt, there was no requirement that jury actually write the words "beyond a reasonable doubt" in its verdict. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

State has right and requirement, in death penalty resentencing cases, to put on evidence impacting Enmund factors, relating to circumstances surrounding victim's death. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Evidence of detailed circumstances of underlying murder was admissible at resentencing in capital murder case to support Enmund factors, concerning whether defendant actually killed, attempted to kill, intended that killing take place and contemplated that lethal force would be employed. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Jury's finding that defendant "intended that a killing take place," which allowed imposition of death penalty, was supported by evidence that defendant gave guns to 2 accomplices, even though accomplices testified that while planning robbery, they had discussed that victim should not be hurt. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

There was sufficient evidence from which the jury could reasonably conclude that the defendant intended to kill where there was evidence placing the defendant in the victims' home on the night of their murders, and there was physical evidence that the victims were bound. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A jury's sentencing verdict did not fail to meet the requirements of subsection (7) of this section where the verdict stated (1) that the defendant actually killed the victim; (2) that the defendant attempted to kill the victim; (3) that the defendant intended that the killing of the victim take place or; (4) that the defendant contemplated that lethal force would be employed, in spite of the defendant's argument that the verdict's disjunctive form suggested a lack of unanimity on any one particular act, since, under the circumstances of the case, a reasonable juror who found any of the factors could not have failed to find the first factor on the list. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

The Weathersby Rule is applicable only in the context of whether or not the defendant killed with malice or intent, i.e., whether there is sufficient evidence to prove that the defendant killed with malice or intent where his or her version of the incident as the only eyewitness, says otherwise. Where the trial on a capital offense has reached the sentencing phase, the defendant's guilt has been found and Weathersby considerations are no longer applicable. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In a prosecution for murder while engaged in the crime of robbery, the jury could reasonably have found that the defendant intended the killings and intended that lethal force be used, for purposes of imposing the death penalty, where the defendant actually participated in the robbery with his accomplice and was present in some role while both murders were committed. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A sentence of death may be upheld only if the record contains legally sufficient evidence that the jury may have found beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed. White v. State, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

Admission by murder defendant that accomplice told him that accomplice wanted victim held and that defendant supplied accomplice with murder weapon after disabling victim establishes requisite personal culpability of defendant for imposition of death penalty. Gray v. State, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127, 1987 U.S. LEXIS 1808 (U.S. 1987).

Finding that capital murder defendant either killed, attempted to kill, intended that killing take place, or used lethal force, as required for imposition of death penalty, need not be made by jury, but may be made by state appellate court, trial judge or jury. Cabana v. Bullock, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986), overruled in part, Pope v. Illinois, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, 1987 U.S. LEXIS 1934 (U.S. 1987).

Evidence that father and 16 year old son committed murder is sufficient to show that father either intended to kill victim or actually committed acts leading to victim's death, as required for imposition of death sentence. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

16. Habitual offender status, generally.

Petitioner's third motion for post-conviction relief was properly denied where he was properly sentenced to life in prison without parole after he pled guilty to capital murder as a habitual offender under Miss. Code Ann. § 99-19-101; arguing a technical defect between the sentencing under Miss. Code Ann. § 99-19-81, as opposed to Miss. Code Ann. § 99-19-83, was of little or no effect. Clark v. State, 960 So. 2d 521, 2006 Miss. App. LEXIS 815 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 394 (Miss. 2007).

In the sentencing phase of a capital murder prosecution, the court's refusal to allow the defendant to inform the jury about his ineligibility for parole as a habitual offender was error even though the court had not yet adjudicated his habitual offender status. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. Hoover v. State, 552 So. 2d 834, 1989 Miss. LEXIS 439 (Miss. 1989).

In sentencing phase of capital murder case in which defendant has also been charged as habitual offender, trial judge properly prohibits defense counsel from presenting testimony speculatively as to whether defendant could be sentenced, as recidivist, to life without parole. Mhoon v. State, 464 So. 2d 77, 1985 Miss. LEXIS 1904 (Miss. 1985), limited, Dotson v. Mississippi (Miss. Ct. App. 1996).

17. —Hearing.

Trial court was required to conduct habitual offender hearing prior to sentencing of defendant for capital murder, in order to make jury aware that, as a habitual offender, defendant could have been sentenced to life imprisonment without possibility of parole. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court's failure to hold habitual offender hearing for defendant convicted of capital murder, which would have allowed jury to sentence defendant to life imprisonment without possibility of parole, required vacatur of death sentence and remand for new sentencing trial with proper instructions. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

A trial court's failure to hold a capital murder defendant's habitual offender status hearing prior to the sentencing phase of the trial did not warrant vacation of the defendant's life sentence, which was to be served without eligibility for parole by virtue of the defendant's habitual offender status, and remand for a new jury imposition of a life sentence with the possibility of parole, since the jury did not impose the death sentence on the defendant but instead sentenced him to life without parole. Gray v. State, 605 So. 2d 791, 1992 Miss. LEXIS 481 (Miss. 1992).

In a capital murder trial, the habitual offender status phase must be conducted prior to the sentencing phase. At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

The holding of a hearing on the issue of habitual offender status, which resulted in a sentence of life without parole, following a bifurcated guilt and sentencing trial on a charge of capital murder, which resulted in a jury verdict of a life sentence, meaning life with parole, rather than death, did not violate the defendant's right against double jeopardy. At the capital murder sentencing hearing on the matter of whether the defendant should be sentenced to death, the defendant was not put in jeopardy on the issue of sentence enhancement based on recidivism. Hoover v. State, 552 So. 2d 834, 1989 Miss. LEXIS 439 (Miss. 1989).

18. Mitigating factors, generally.

During the sentencing phase of a capital murder trial, there was no error in the trial court's exclusion of evidence of the impact of defendant's death on defendant's family because it was not relevant as mitigating evidence. Pitchford v. State, 45 So. 3d 216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

In a capital murder case, as defendant's case was before the trial court for the sole purpose of sentencing, the trial court properly refused a mitigating instruction which pertained to the question of defendant's guilt in a killing for which he had already been convicted; defendant was not entitled to an instruction on residual doubt as to his guilt at his resentencing trial. King v. State, 960 So. 2d 413, 2007 Miss. LEXIS 317 (Miss. 2007), cert. denied, 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244 (U.S. 2008).

Appellant could not rely on Miss. Code Ann. § 99-19-101(6) to support her claim that her counsel had inadequately represented her in failing to investigate and present mitigating evidence during her sentencing hearing on her conviction for arson because § 99-19-101(6) concerned mitigating evidence presented to a jury in capital cases. Arson was not a "capital crime" as defined by Miss. Code Ann. § 1-3-4 because § 1-3-4 limited capital crimes to crimes punishable by death or imprisonment for life in the state penitentiary, and the maximum punishment for arson was 20 years in the penitentiary under Miss. Code Ann. § 97-17-1 (Rev.). Smith v. State, 880 So. 2d 1094, 2004 Miss. App. LEXIS 865 (Miss. Ct. App. 2004).

The trial court erred by excluding testimony that a mental health center had failed the defendant, which would have included testimony that the defendant's older brother had also fared badly in life, but that his younger brother had done much better because the mental health facility was more competent by the time he arrived there. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

The defendant could not complain that he was not afforded the opportunity to instruct the jury to consider his impoverished and traumatic childhood as mitigating factors where the court gave the jury the general catch-all instruction. Smith v. State, 724 So. 2d 280, 1998 Miss. LEXIS 589 (Miss. 1998).

The court rejected the argument that the burden of proof is shifted by requiring that the mitigating circumstances outweigh the aggravating circumstances. Crawford v. State, 716 So. 2d 1028, 1998 Miss. LEXIS 100 (Miss.), cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 458, 1998 U.S. LEXIS 7664 (U.S. 1998).

State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from giving effect to evidence which they believe calls for sentence less than death, even if all jurors agree that mitigating circumstance exists, unless jurors unanimously find existence of same mitigating circumstance. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369, 1990 U.S. LEXIS 1179 (U.S. 1990).

Refusal to require prosecution, at resentencing in capital rape-murder case in which victim's numerous injuries included stab wound, to disclose victim's criminal history with respect to use of knives was not Brady violation, though such information was allegedly relevant to mitigator of consent or participation by victim; omission did not create reasonable probability of changing outcome, since even if victim engaged in knifeplay with defendant, it was not logical that she would have consented to having pair of underwear stuffed into throat or would have helped defendant to hit her with sufficient force to fracture her skull. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Prosecutor's alleged misstatement of law by mischaracterizing defense position at capital sentencing proceeding as trying to prove that defendant was so drunk that he did not know what he was doing at time of rape and murder, when defendant was actually trying to establish mitigating circumstance of inability to appreciate criminality of his conduct or to conform his conduct to requirements of law, was cured by jury instruction that correctly defined the mitigator. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Denial of instruction, proposed by defendant at capital sentencing proceeding, that jury was required to find a mitigating circumstance if it was proven by preponderance of evidence, was not error; instruction on mitigating factors did not have to give exact burden of proof. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Where sentencer is not permitted to consider all mitigating evidence, there is a risk of erroneous imposition of death sentence, and case will be remanded for resentencing. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Harshness of life sentence in state prison is no way related to capital murder defendant's character, his record, or circumstances of crime, and therefore, it was properly excluded in sentencing phase. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Testimony from defendant's family that they wished for his life to be spared was not relevant to defendant's character, record, or circumstances of offense and was properly excluded at capital murder sentencing trial. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Where sentencer is not permitted to consider all mitigating evidence, there is risk of erroneous imposition of death sentence and case will be remanded for resentencing. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Sentencer may not be precluded from considering as mitigating factor any aspect of defendant's character or record or any circumstance of offense that defendant proffers as a basis for sentence less than death; defendant is entitled to individualized consideration of his character, his record, and his crime. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

"Catch-all" mitigating circumstance instruction adequately afforded jury opportunity to consider remorse as mitigating factor during sentencing phase of capital murder case. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant, in resentencing phase of capital murder trial, is not collaterally estopped from introducing mitigating evidence, but in resentencing the only admissible evidence is evidence of aggravating and mitigating factors, and retrial of issues relating only to guilt is not permitted. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Statute stating that evidence may be presented in capital murder proceeding as to any matter that court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances applies even if it is necessary for another jury to determine the issue of penalty. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In capital murder prosecution in which instruction required unanimous finding beyond reasonable doubt of aggravating circumstances, it could not reasonably be inferred that silence of instruction as to finding mitigating circumstances would likely cause jury to assume that unanimity was also the requirement for mitigating circumstances. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In resentencing phase of capital murder prosecution, instruction that jury had to find that mitigating circumstances did not outweigh aggravating circumstances was not improper as shifting burden of proof from state to defendant. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Jury in capital murder case did not have to be specifically instructed that mitigating circumstances were to be found individually and not unanimously before being considered in weighing process. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Instruction in death penalty case which included all mitigating factors contained in statute except "age of the defendant" was proper; "age of the defendant" factor would fall under "catch-all" mitigating circumstance. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

"Catch-all" mitigating factors in capital murder sentencing proceeding encompasses all nonstatutory mitigating circumstances, including defendant's remorse, and, thus, defendant was not entitled to separate mitigating instruction that he had demonstrated extreme remorse for crimes committed. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Defendant was not entitled to have listed as mitigating circumstance the fact that none of her 3 accomplices had received death penalty; jury was aware that none of her accomplices had received death penalty, and trial court informed jury that it should not limit its consideration to those mitigating circumstances listed. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

Submission to a capital sentencing jury of the mitigating factor that the defendant had no "significant" history of criminal activity was not improper, in spite of the defendant's argument that the factor was unconstitutionally applied in his particular case because it implied that he had at least some criminal history when in fact he had none, where the mitigating factor was taken verbatim from the list provided by the legislature to be considered in imposing sentence, and the defendant had the opportunity during closing argument to dispel any notion the jury might have had that he had a history of criminal activity. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

A capital sentencing jury's failure to provide a written list of all the mitigating circumstances it found in its deliberation did not constitute reversible error; subsection (3) of this section does not entitle a defendant to have any mitigating circumstances the jury may have considered individually listed. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

A sentencing jury's failure to make written findings as to mitigating circumstances did not require reversal of a death sentence; § 99-19-103 requires a written enumeration of aggravating circumstances only, and this section has never been read to require an express written list of all the mitigating circumstances which members of the jury may find extant and such a list would often be impracticable because the law requires no consensus among jury members regarding mitigating factors. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

New sentencing hearing was required where trial court had excluded relevant mitigating evidence about method for generating electricity from alternative energy source, defendant had been in contact with Tennessee Valley Authority over this invention, had entered into agreement with them about it, and witness was familiar with all details and would testify about them. Jordan v. State, 518 So. 2d 1186, 1987 Miss. LEXIS 2799 (Miss. 1987), cert. denied, 488 U.S. 818, 109 S. Ct. 57, 102 L. Ed. 2d 35, 1988 U.S. LEXIS 3832 (U.S. 1988).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. Stringer v. State, 500 So. 2d 928, 1986 Miss. LEXIS 2609 (Miss. 1986).

Murder defendant could not complain of state's instruction which, although it impliedly allowed the jury to consider his prior burglary conviction, it also allowed the jury to consider the fact that his prior record was non-violent as a mitigating factor, and the instruction tracked this section in listing the mitigating factors which the jury could consider. Irving v. State, 498 So. 2d 305, 1986 Miss. LEXIS 2518 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826, 1987 U.S. LEXIS 2032 (U.S. 1987).

Convicted capital murder defendant is not entitled, during sentencing phase of prosecution, to have jury consider, as relevant mitigating circumstance, that accomplices have received verdicts of life imprisonment from juries in separate capital murder trials. Johnson v. State, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

In a prosecution for capital murder committed during a robbery, the trial court erred when it instructed the jury that it was precluded from considering nonstatutory mitigating factors in determining whether to impose the death penalty. Washington v. Watkins, 655 F.2d 1346, 1981 U.S. App. LEXIS 17763 (5th Cir. Miss. 1981), cert. denied, 456 U.S. 949, 102 S. Ct. 2021, 72 L. Ed. 2d 474, 1982 U.S. LEXIS 1937 (U.S. 1982).

19. —Retarded, low IQ, or diminished capacity.

Evidence at sentencing phase of capital murder case was sufficient to support finding that aggravating circumstances outweighed any mitigating circumstances based on defendant's mild mental retardation and alleged mental or emotional disturbance at time of crime, and supported imposition of death penalty; evidence indicated that defendant was only mildly mentally retarded, that mental retardation alone would not cause extreme emotional disturbance and that defendant's actions after killing victim were inconsistent with mental "snap" or true mental illness. Wells v. State, 698 So. 2d 497, 1997 Miss. LEXIS 258 (Miss. 1997), cert. denied, 522 U.S. 1122, 118 S. Ct. 1065, 140 L. Ed. 2d 125, 1998 U.S. LEXIS 1059 (U.S. 1998).

Defendant was not entitled to diminished capacity instruction in capital murder case, even though doctor testified that defendant's substance abuse problem caused him to suffer "a diminished cerebral activity, cerebral ability" at time of crime; there was no evidence that defendant was substantially impaired in his capacity to appreciate criminality of his conduct and to conform his conduct to requirements of the law. Wiley v. State, 691 So. 2d 959, 1997 Miss. LEXIS 43 (Miss.), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153, 1997 U.S. LEXIS 5706 (U.S. 1997).

Mental retardation is not a bar to execution of one convicted of capital murder, but is only a mitigating circumstance. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err by excluding mitigating evidence in the form of testimony from the defendant's sister regarding incidents when the defendant "heard voices" where a proper foundation was not laid in that the trial court had no reason to believe that the witness had any independent knowledge of the events aside from her brother's telling her about them, the record was devoid of any medical testimony indicating that the defendant was schizophrenic at the time of the murder, and no medical experts testified on the defendant's behalf. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in subsections (6)(b), (f) and (g) of this section and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

Death sentence for mentally retarded accused was not categorically prohibited by Eighth Amendment, but accused is entitled to instruction as to mitigating effect of mental retardation and childhood abuse. Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256, 1989 U.S. LEXIS 3148 (U.S. 1989).

In prosecution for murder, where defendant presented evidence that his IQ was about 70, that he was a slow learner, that he scored low on achievement tests, and that he had sustained a head injury several years prior to the commission of the crime, but where evidence was also presented that, thereafter, he returned to school and excelled in carpentry work, and that he went on to graduate and got a college football scholarship, the court held that, on the basis of this evidence, there was nothing presented which would have warranted an instruction on the defendant's capacity to "appreciate the criminality of his conduct," as required by this section, at the time the murder took place. In re Hill, 460 So. 2d 792, 1984 Miss. LEXIS 2003 (Miss. 1984).

In a prosecution for capital murder, the trial court properly refused an instruction permitting the jury to consider defendant's diminished capacity to appreciate the criminality of his conduct, pursuant to subsection (6)(f) of this section, in the absence of any expert testimony suggesting that defendant was mentally retarded or that he was suffering from a mental disorder, disease or defect. Williams v. State, 445 So. 2d 798, 1984 Miss. LEXIS 1578 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795, 1985 U.S. LEXIS 471 (U.S. 1985).

20. —Age or character.

Prosecutor's comment on capital murder defendant's voluntary drug use to rebut mitigating circumstance of no significant history of criminal activity did not violate defendant's right to fair trial, where defendant placed his prior criminal activity at issue. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Defendant was not entitled to instruction on mitigating circumstance in death penalty phase that she would be 70 years old before she would have been eligible for parole; defendant's age at time she would be eligible for parole, if given life sentence, was speculative. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Imposition of death penalty for crimes committed at age 16 or 17 is not mode or act of punishment that was considered cruel and unusual at time Bill of Rights was adopted, and there is no modern national consensus forbidding imposition of death penalty for crimes committed at those ages. Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306, 1989 U.S. LEXIS 3195 (U.S. 1989), overruled in part, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, 2005 U.S. LEXIS 2200 (U.S. 2005).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character, record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. West v. State, 519 So. 2d 418, 1988 Miss. LEXIS 17 (Miss. 1988).

In granting a new trial on the sentence phase for a 16 year old female convicted of homicide, appellate court would note that defendant's age remained a mitigating factor to be considered by the jury under this section. Cannaday v. State, 455 So. 2d 713, 1984 Miss. LEXIS 1753 (Miss. 1984), cert. denied, 469 U.S. 1221, 105 S. Ct. 1209, 84 L. Ed. 2d 351, 1985 U.S. LEXIS 1031 (U.S. 1985), cert. denied, 469 U.S. 1229, 105 S. Ct. 1229, 84 L. Ed. 2d 366, 1985 U.S. LEXIS 1115 (U.S. 1985).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice (§ 99-19-105), and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

21. Closing argument.

Prosecutor's comment in closing argument in resentencing in capital case, that there had been nothing wrong with defendant's IQ in one intelligence test, was fair comment on evidence offered by defendant to demonstrate mitigator of inability to comprehend criminality of his conduct, where test relied upon by defendant's expert witness indicated that defendant's IQ was in normal range. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Prosecutor's closing argument in capital sentencing proceeding, in which he highlighted apparent contradiction between brain scans and EEG reports finding defendant normal and testimony of defense psychologist that his tests showed brain dysfunction, was not precluded by psychologist's testimony that there was no contradiction because the tests measured two different things; prosecutor's statements were based on fact, and prosecutor could offer his theory that brain scans and EEG results showed defendant to be normal despite psychologist's tests. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Prosecutor's comment in closing argument at capital sentencing proceeding, that the only witness to rape-murder, namely, the victim, was killed, was not improper comment on defendant's decision not to testify; statement was made in direct response to defense counsel's question to jury as to why defendant had not killed two others present in house at the time of offenses if his object was to prevent apprehension. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Prosecutor's statement in closing argument at resentencing in capital murder proceeding, that the forensic evidence was unquestionable, did not constitute improper comment on defendant's decision not to testify; argument was made in response to closing argument by defense. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Defendant waived review of claim that prosecution seized on evidence presented by murder victim's daughter concerning victim's personal characteristics to make impermissible arguments for imposing death penalty by failing to object during argument, despite his objection during victim's daughter's testimony. Berry v. State, 703 So. 2d 269, 1997 Miss. LEXIS 639 (Miss. 1997).

Prosecutor did not make improper statement of law, in closing argument of penalty phase in capital murder case, that matters in mitigation carry less weight than matters of aggravation; remarks were supported by law which holds that aggravating factors must be found beyond reasonable doubt, while mitigating factors may simply be found. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor in capital murder case did not utilize absence of mercy instruction to improperly argue that jurors could not consider mercy or sympathy in their deliberations; prosecutor was allowed to argue that defendant was not deserving of sympathy and jurors had been informed by court that statements of counsel were not evidence, and that they must follow court's instructions and consider evidence presented. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor did not impermissibly suggest that it was the State Supreme Court, rather than the jury, that had the responsibility of imposing death sentence, when prosecution commented that death penalty had "been through the courts" and had been "honed and sharpened and brought into keen focus." Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor's comment at death penalty phase of trial that defendant had "turn[ed] to a life of crime" was not so improper as to require reversal; evidence in record indicated that defendant was serving sentence for armed robbery, and defendant had just been found guilty of capital murder. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Exception to general rule that state may not mention possibility of appellate review exists where statement is made in response to statement of defense counsel. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defense counsel's comments that Charles Manson murders were more gruesome than that committed by defendant, yet Manson had not received death penalty, opened door for prosecution to mention appellate review by stating that death penalty had been imposed in Manson case but that death penalty statute had later been held unconstitutional. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In the penalty phase of a capital murder prosecution, the prosecutor's comment that "we have never heard one single witness say he ever felt sorry for what he did" was not impermissible, as it was simply an argument that none of the defendant's mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for "lack of remorse" as an aggravating factor. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

A trial court's limitation of closing argument to 15 minutes in the sentencing phase of a capital murder prosecution did not violate the defendant's constitutional right to a fair trial where the defendant made no proffer as to what he would have argued had he been given additional time, and he raised no objection to the time limit at the time of trial. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial judge abused his discretion in denying the defendant's request for 25 minutes for closing argument and granting him 15 minutes "to the side." A defendant must be allowed, within reason, whatever time he or she believes is necessary to seek a penalty less than death, and the defendant's request for 25 minutes was within reason. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

22. Jury instructions, generally.

Trial court properly instructed the jury as to the findings necessary to impose a sentence of death based on state law because according to precedent, the Mississippi capital-sentencing scheme was constitutional. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Jury instruction on the "great risk of death" aggravator was proper because the evidence showed that defendant entered a home intending to attack the victim, and in doing so, he shot the victim's parents and held a gun on the victim's brother. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Trial court did not fail to instruct the jury before its overnight break between the guilt and sentencing phases of the trial because the jury was instructed appropriately at various other breaks before the overnight break between the guilt and sentencing phases of the trial; the jury was cautioned repeatedly by the trial judge and warned at the beginning of the sentencing phase, and the jury was presumed to have followed the instructions of the trial court. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Trial court did not err in instructing the jury to consider as two separate aggravating circumstances that defendant previously had been convicted of a violent felony and that he had committed the capital crime under a sentence of imprisonment because those two aggravating circumstances were listed separately in the statute. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Trial court committed no error in granting the State of Mississippi's omnibus instruction and in denying defendant's proffered mercy instruction because the court properly instructed the jury on weighing the mitigating circumstances versus the aggravating circumstances in defendant's capital murder trial. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Because the jury was properly instructed on the elements of robbery, the jury was therefore permitted to consider as an aggravating circumstance whether the killing of the victim was committed during the commission of the crime of robbery. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

At the time of his trial, the inmate did not prove an entitlement to the grant of the diminished capacity instruction, and the Mississippi Supreme Court was not unreasonable in refusing to grant a diminished capacity instruction on the basis of a history of drug and alcohol abuse; even if the refusal to grant the instruction could be considered error, the United States Supreme Court has long-approved of catch-all instructions of the type given in the case to cure any deficiency in jury instructions. Wiley v. Epps, 668 F. Supp. 2d 848, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. 2009), aff'd, 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Catch-all instruction regarding mitigating circumstances had been approved to encompass any mitigating circumstances not specifically enumerated under Miss. Code Ann. § 99-19-101(6). Wiley v. Epps, 668 F. Supp. 2d 848, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. 2009), aff'd, 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Based on jury instructions given and the written verdict delivered in defendant's capital murder case, it was clear that the jury had followed the instructions on the burden of proof applying to a finding of aggravating circumstance, although there was no requirement that the verdict be "beyond a reasonable doubt," and there was no violation of Apprendi or Ring; further, the transcript of the verdict clearly indicated that it had been unanimous, and in compliance with Miss. Code Ann. §§ 99-19-101 and 99-19-103. Grayson v. State, 879 So. 2d 1008, 2004 Miss. LEXIS 721 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593 (U.S. 2005).

In defendant's capital murder conviction where defendant was sentenced to death, because Miss. Code Ann. § 47-7-3(1)(f) denied parole eligibility to any person charged, tried, convicted, and sentenced to life imprisonment under the provisions of Miss. Code Ann. § 99-19-101, the trial court did not err in not instructing the jury on life imprisonment with the possibility of parole. Branch v. State, 882 So. 2d 36, 2004 Miss. LEXIS 586 (Miss. 2004), cert. denied, 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289 (U.S. 2005).

In a capital murder case, the aggravating circumstances instruction complied with Miss. Code Ann. § 99-19-101(7), circumstantial evidence language was not required in charging the jury as to the statutory requirements, and sufficient evidence supported an instruction pursuant to § 99-19-101(5)(e) on preventing a lawful arrest as an aggravating factor. Lynch v. State, 877 So. 2d 1254, 2004 Miss. LEXIS 591 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592 (U.S. 2005).

There was no violation of the Eighth Amendment to the United States Constitution when the trial court instructed the jury that the procedure it was to follow was not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances, but that it was required to apply reasoned judgment as to whether the situation called for life imprisonment without parole, life imprisonment, or whether it required the imposition of death, in light of the totality of the circumstances present; such instruction did not permit the jury to substitute its own judgment in place of the statutory scheme or to ignore the elements of aggravation and mitigation or to set them aside in favor of their own subjective feelings about the proper sentence. Goodin v. State, 787 So. 2d 639, 2001 Miss. LEXIS 135 (Miss. 2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1558, 152 L. Ed. 2d 481, 2002 U.S. LEXIS 2500 (U.S. 2002).

In a prosecution for capital murder, the court did not err in not instructing the jury with regard to a sentence of life imprisonment with the possibility of parole; the earned time allowance and parole statutes effectively eliminate the possibility of parole for someone convicted of capital murder. Puckett v. State, 737 So. 2d 322, 1999 Miss. LEXIS 122 (Miss. 1999).

An instruction that "the court instructs the jury that it must be emphasized that the procedure you must follow is not a mere counting process or a certain number of aggravating circumstances versus the number of mitigating circumstances, rather, you must apply your reason to judgment as to whether this situation calls for life imprisonment or whether it requires the imposition of death in light of the totality of the circumstances present" did not instruct the jury to consider other non-statutory aggravating factors and, instead, merely informed the jury on the manner in which they were to evaluate those aggravating circumstances which they could consider under the statute. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

The trial court did not commit reversible error when it instructed the sentencing jury that it could consider the "detailed circumstances of the offense for which the defendant was convicted." Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

The failure of the court to instruct the jury that it must make written findings of mitigation was not reversible error since the statute does not require an express written list of all of the mitigating circumstances which members of the jury might find extant. Bell v. State, 725 So. 2d 836, 1998 Miss. LEXIS 305 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805, 1999 U.S. LEXIS 3380 (U.S. 1999).

Refusal to give instruction that defendant had declined to testify at capital sentencing proceeding because of being inarticulate, as part of instruction on defendant's right not to testify, was proper where there was no evidence presented of defendant's being inarticulate or ill-at-ease around a jury, and no evidence indicating that any brain impairment or dysfunction he might have would adversely affect his ability to testify. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Mississippi case law will not permit an instruction without credible evidence supporting its premise. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Defendant's proposed jury instruction, which asserted as fact an entirely speculative matter regarding sentencing for a second murder, was confusing and misleading and properly refused. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Jury instruction that all twelve jurors had to agree on verdict before verdict could be returned into court, when read with another instruction which made clear the option jury had in returning to courtroom, properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

When read as a whole, instructions properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment, where court instructed "that all 12 jurors must agree on the verdict before the verdict can be returned into Court," and also made it clear that jury's options were to return verdict of death, return verdict of life imprisonment, or report their inability to agree on a verdict, despite claim that instructions failed to clarify that if, within a reasonable time, jury failed to agree unanimously, it must cease deliberations and report its findings to the court. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Trial court did not improperly speculate on parole in capital murder case by telling venire about possibility of parole should defendant be sentenced to life in prison; trial court emphasized that court and jury had no control over parole, when further pressured by venire regarding parole eligibility, court gave truthful response, and at close of presentation of evidence, court properly instructed jury regarding options of life and death. Wiley v. State, 691 So. 2d 959, 1997 Miss. LEXIS 43 (Miss.), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153, 1997 U.S. LEXIS 5706 (U.S. 1997).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue, which was raised or should have been raised at trial or in direct appeal, as to whether defense counsel's failure to object to aggravating circumstances at penalty phase constituted ineffective assistance of counsel; procedural bar applied to aggravating circumstances, which did not get special treatment. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Defendant charged with capital murder was not entitled to presumption at sentencing phase that life was appropriate punishment. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

"Catch-all" mitigating circumstance instruction adequately afforded jury opportunity to consider remorse as mitigating factor during sentencing phase of capital murder case. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant was not entitled to jury instruction during sentencing phase of capital murder case informing jury that execution would be by lethal injection if he were sentenced to death. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Murder defendant was procedurally barred from raising, on appeal from resentencing, failure to give jury instruction setting forth the elements of the underlying offense of kidnapping as an aggravating factor where defendant did not object to sentencing instruction on that ground in trial court. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Jury in resentencing phase of capital murder prosecution did not have to be instructed on elements of capital murder, murder and kidnapping in order to find beyond reasonable doubt existence of aggravating circumstance that murder was committed during kidnapping, though it would have been optimum situation to include such instruction; omission of kidnapping instruction in resentencing phase was cured by original jury's convicting defendant of murder and kidnapping. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Jury in resentencing phase of capital murder trial did not have to "re-find" elements of murder or kidnapping in finding aggravating circumstance of murder during kidnapping, but could rely on prior finding made by jury during guilt- finding phase. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In sentencing phase of capital trials, statutory aggravating circumstances must be unanimously found beyond a reasonable doubt. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In capital murder prosecution, giving of instruction on mitigating circumstance, that victim was participant in defendant's conduct or consented to act, was not improper or prejudicial as lacking factual basis or because jury would assume that defendant offered the mitigating circumstance, in case dealing with both consensual and forced sexual intercourse, consensual and forced movement from one location to another, and voluntary consumption by victim of drugs and intoxicants. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In resentencing phase of capital murder prosecution, instruction that jury had to find that mitigating circumstances did not outweigh aggravating circumstances was not improper as shifting burden of proof from state to defendant. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Jury in capital murder case did not have to be specifically instructed that mitigating circumstances were to be found individually and not unanimously before being considered in weighing process. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Instruction at penalty phase of capital murder prosecution that mitigating circumstances must outweigh aggravating circumstances does not shift state's burden of proving the aggravating circumstances. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

It was proper to instruct jurors at penalty phase of capital murder prosecution that they should disregard sympathy in reaching their sentencing decision. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

The court did not err when it instructed the jury that it could consider "the detailed circumstance of the offense." Doss v. State, 709 So. 2d 369, 1996 Miss. LEXIS 267 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821, 1998 U.S. LEXIS 3048 (U.S. 1998).

Instruction which prohibits, expressly or impliedly, consideration of mitigating circumstances not found unanimously is flawed and requires reversal. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Court was not required to specifically instruct the jury considering death penalty that they did not have to find mitigating circumstances unanimously in order for particular juror to consider them. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury considering death penalty can impliedly be charged with knowledge that unanimous finding of mitigating circumstances is not required where jury has been instructed that no degree of consensus on mitigating circumstances is required. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Courts are encouraged to instruct jurors considering death penalty that, even if all 11 other jurors find that a certain mitigating circumstance does not exist, juror who believes that it does exist must find that mitigating circumstance and weigh it in further deliberations. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instruction at penalty phase of capital murder prosecution did not provide for unanimous decision for death and unanimous decision for life but, rather, for unanimous decision for death and decision for life; instruction did not require that jury unanimously find for life sentence. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Trial judge's instruction that jurors should return to jury room to clarify ambiguity in jury's findings that supported sentence of death did not taint verdict; jury had death penalty instruction with it, and court directed jury to re-form verdict "if it is the decision of the jury." Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Whimsical or residual doubt instructions are not required as a mitigating circumstance in death penalty cases. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

State has no burden to rebut mitigating evidence and, thus, capital murder defendant was not entitled to requested sentencing instruction directing jury that credible evidence of mitigating factors may be considered when weighing mitigating against aggravating circumstances unless state rebuts evidence beyond reasonable doubt. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Method of execution was of no concern to jury and, thus, capital murder defendant was not entitled to sentencing phase instruction informing jurors that defendant would be executed by lethal injection if sentenced to death. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court did not violate Eighth Amendment rights of capital murder defendant by refusing to give sentencing phase instruction that court was obligated to consider mitigating factors which in fairness, sympathy and mercy to defendant extenuate or reduce degree of blame or punishment. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Instruction that in deciding whether to impose death penalty, jury was "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," was proper. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction that life sentence rather than death penalty was presumed to be appropriate sentence unless presumption was overcome. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Instruction that for jury to impose death penalty, it had to find that mitigating circumstances did not outweigh aggravating circumstances, did not improperly allow jury to impose death penalty based solely on presence of aggravating circumstances. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. Colosimo v. Senatobia Motor Inn, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73 – the statute under which the defendant pled guilty–defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in subsections (6)(b), (f) and (g) of this section and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

Juries must be instructed that the findings that must be made by a jury in order to impose a death sentence, under subsection (7) of this section, must be made beyond a reasonable doubt. White v. State, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

A sentence of death may be upheld only if the record contains legally sufficient evidence that the jury may have found beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed. White v. State, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

Murder defendant could not complain of state's instruction which, although it impliedly allowed the jury to consider his prior burglary conviction, it also allowed the jury to consider the fact that his prior record was non-violent as a mitigating factor, and the instruction tracked this section in listing the mitigating factors which the jury could consider. Irving v. State, 498 So. 2d 305, 1986 Miss. LEXIS 2518 (Miss. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826, 1987 U.S. LEXIS 2032 (U.S. 1987).

Jury instruction in penalty phase of capital murder prosecution which follows language of this section and § 99-19-103 need not define aggravating circumstances which may be found by jury; sentencing instruction does not impermissibly favor sentence of death by instructing jury foreman concerning completion of verdict forms only if death sentence is imposed; jury need not be instructed of authority to return life sentence even where aggravating circumstances outweigh mitigating circumstances. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

In a capital murder prosecution in which defendant was sentenced to death under this section and § 99-19-103, the trial court did not err in refusing to instruct the jury that they must return a verdict of life imprisonment unless they believed beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. Hill v. State, 432 So. 2d 427, 1983 Miss. LEXIS 2613 (Miss.), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352, 1983 U.S. LEXIS 2329 (U.S. 1983).

23. — Prior felony involving use of threat of violence.

On appeal from his convictions for capital murder during the commission of a robbery and resulting death sentence, the State failed to provide sufficient evidence to support the inclusion of a "previous violent felony" jury instruction, Miss. Code Ann. § 99-19-101(5)(b). Therefore, the trial court erred in instructing the jury to consider whether defendant was previously convicted of a felony involving the use or threat of violence to the person; however, the error was harmless. Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

24. —Limiting instruction.

Limiting instruction is not required with respect to jury's consideration of evidence concerning aggravating circumstance of committing murder in order to avoid arrest. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

"Heinous, atrocious, or cruel" instruction in capital murder prosecution must be accompanied by appropriate limiting instruction. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Instruction defining "heinous, atrocious, or cruel" murder as one "accompanied by such additional acts as to set the crime apart from the norm of capital murders–the conscienceless of pitiless crime which is unnecessarily torturous to the victim" was sufficient, even though instructions also stated that "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Jury instruction during sentencing phase of capital murder trial sufficiently limited jury's consideration of "heinous, atrocious or cruel" aggravating circumstance and was not unconstitutionally vague or overbroad. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Instruction on aggravating factor for death penalty purposes that capital offense was especially heinous, atrocious or cruel was not unconstitutionally vague, as instruction set out definitions of the terms, and provided examples. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Instruction on aggravating factor for death penalty purposes that murder was especially heinous, atrocious or cruel was not inadequate on ground that it failed to speak exclusively to defendant's moral culpability, allegedly told jury that defendant had in "fact" used method of killing that caused serious mutilation, or because "heinous, atrocious, or cruel" is disjunctive rather than conjunctive. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Capital sentencing instruction concerning "especially heinous, atrocious, or cruel" aggravating circumstance adequately channelled jury's discretion and thus was not unconstitutional, despite fact that part of instruction was invalid under Shell. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Jury instruction during sentencing phase of capital murder prosecution, defining especially heinous, atrocious or cruel offense, adequately limited jury's consideration, despite contention that instruction was unconstitutionally overbroad and vague in that it established a multiple choice questionnaire for jurors to contend with. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in Maynard v. Cartwright (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, Clemons v. Mississippi (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and Maynard and Clemons did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in Godfrey v. Georgia (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

Where, in sentencing hearing which ended in jury determination that accused should receive death penalty, court instructed jury that, in considering whether murder was "especially heinous, atrocious, or cruel" within meaning of statutory aggravating factors, "heinous" meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile," and "cruel" meant "designed to inflict a high degree of pain with indifference to, or even enjoyment of, a suffering of others," U.S. Supreme Court reversed state Supreme Court judgment insofar as it relied on "heinous, atrocious, or cruel" aggravating factor, and remanded case for further consideration, holding that limiting instruction used by trial court was not constitutionally sufficient. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

It was not improper for aggravating circumstance described in subsection (5)(h) of this section ("especially heinous, atrocious, or cruel" offense) to be submitted to jury without limiting instruction, where defendant, during course of robbery, had ordered grocery store clerk to kneel and had shot him in head from distance of approximately 3 or 4 feet prior to leaving store, particularly where this circumstance was one of several statutory aggravating circumstances relied on by State and found by jury. Evans v. Thigpen, 631 F. Supp. 274, 1986 U.S. Dist. LEXIS 27843 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 1987 U.S. App. LEXIS 1850 (5th Cir. Miss. 1987).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in Coleman v. State, 378 So. 2d 640, 1979 Miss. LEXIS 2542 (Miss. 1979).

25. —Beyond a reasonable doubt.

"Beyond a reasonable doubt" is not the burden on the process of weighing mitigating circumstances against aggravating circumstances under Miss. Code Ann. § 99-19-101(2)(c) and (3)(c) in a capital murder case. The majority rule is that jurors are required to find the existence of each aggravating circumstance beyond a reasonable doubt, but the jury is not required to find that the aggravating circumstances beyond a reasonable doubt outweigh the mitigating circumstances following the statute. Thorson v. State, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

In sentencing phase of capital trials, statutory aggravating circumstances must be unanimously found beyond a reasonable doubt. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In capital murder prosecution in which instruction required unanimous finding beyond reasonable doubt of aggravating circumstances, it could not reasonably be inferred that silence of instruction as to finding mitigating circumstances would likely cause jury to assume that unanimity was also the requirement for mitigating circumstances. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

The "beyond a reasonable doubt" standard of proof applies in the sentencing phase of capital trials. Capital sentencing juries have no authority to find statutory aggravating circumstances unless such "unanimously be found beyond a reasonable doubt." White v. State, 532 So. 2d 1207, 1988 Miss. LEXIS 365 (Miss. 1988).

In the sentencing phase of a capital murder charge, where the reasonable doubt instruction has been given, there is no error in failing to instruct that every reasonable doubt the jury may have regarding any evidence in the case must be resolved in favor of the accused and against the state. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

26. —"Mercy" instruction.

The trial court committed reversible error in a murder prosecution when it instructed the jury that "you . . . must not consider sympathy as part of this case" and "sympathy [can] have no part in your deliberations;" the belief that jurors could erase the natural human considerations that underlie their decisions would be naive, and to insist that they do so is futile and erroneous. King v. State, 784 So. 2d 884, 2001 Miss. LEXIS 99 (Miss. 2001).

Instruction that jury in capital sentencing proceeding could not be influenced or swayed by bias, sympathy, or prejudice did not totally shut off consideration of sympathy and therefore was in accord with both state and federal caselaw. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Trial court had discretion whether to grant defendant's requested "mercy" instruction during sentencing phase in capital murder case. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Capital murder defendant was not entitled to requested sentencing phase jury instructions on use of mercy, pity or sympathy; trial court has discretion to give mercy instructions. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to requested sentencing phase instructions directing jury that death sentence should not be selected if any juror has doubt about proper punishment and that jury was not required to sentence him to death; requests were for mercy instructions, which trial court has discretion to give. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Defendant was not entitled to instruction at death penalty phase of trial that jury had to consider sympathy and mercy on her behalf; several instructions had directed jury that it was required to consider mitigating circumstances. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant is not entitled to mercy instruction at death penalty phase of trial. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A capital murder defendant is not entitled to a "mercy" instruction. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

In the sentencing phase of a capital case, a "mercy" instruction stating that a life sentence could be returned regardless of the evidence was not required even though the prosecutor was allowed to elicit promises from the jurors during voir dire that they would return a death sentence if they believed that the aggravating circumstances outweighed the mitigating circumstances. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

Although no reversible error is committed in failing to instruct that jury may grant accused mercy even though it finds insufficient mitigating circumstances to outweigh the aggravating circumstances, the granting of such mercy instruction would further refine and direct the jury's discretion in sentencing between those cases in which the death penalty is given and those in which it is not. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

27. Cruel and unusual punishment.

Defendant's life-imprisonment sentence after he was convicted of capital murder was neither cruel nor unusual under Miss. Code Ann. § 99-19-101(1) and Miss. Code Ann. § 47-7-3(1)(f) because the only possible sentence for conviction of capital murder committed after July 1, 1994, other than the death penalty, would have been life without parole; defendant's sentence under his conviction of capital murder not only fell within the prescribed statutory limits, but was the only sentence that could have been imposed. Anderson v. State, 5 So. 3d 1088, 2007 Miss. App. LEXIS 677 (Miss. Ct. App. 2007), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Defendant's death sentence was proper pursuant to Miss. Code Ann. §§ 99-19-101(7), 99-19-105(3) and the Eighth and Fourteenth Amendments where it was not imposed under the influence of passion, prejudice, or any other factor; evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances; it was not excessive or disproportionate when compared to other factually similar cases where the death penalty was imposed; and the jury did not consider any invalid aggravating circumstances. Additionally, many of defendant's complaints about various statements were procedurally barred for the failure to make a contemporaneous objection. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Defendant was not entitled at capital sentencing proceeding to mercy instruction stating that jury could impose life imprisonment even without mitigating factors. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Death sentence imposed in rape-murder case was not excessive or disproportionate to penalty imposed in similar cases, where crime involved shooting victim four times, asphyxiating her by stuffing panties down her throat and by tying shirt around her neck, delivering skull-crushing blow, and inflicting genital and rectal injuries over a period of at least 45 minutes, and where defendant, though assertedly suffering from brain dysfunction, had normal brain scans and an average IQ and did not contend he did not know right from wrong. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Defendant could not assert that death penalty violated Eighth Amendment because statutes did not set a minimum age below which child may not be transferred from youth court to circuit court for crimes punishable by death where defendant committed his crime at age 17, an age where it is sufficiently clear that no national consensus forbids imposition of capital punishment. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

The execution of a defendant who had been repeatedly diagnosed as a chronic paranoid schizophrenic did not constitute cruel and unusual punishment, since every expert who testified stated that one could be a paranoid schizophrenic and still be competent to be executed under § 99-19-57. Billiot v. State, 655 So. 2d 1, 1995 Miss. LEXIS 88 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762, 1996 U.S. LEXIS 787 (U.S. 1996).

The Eighth Amendment was not violated by a judge's imposition of the death penalty pursuant to a statute requiring the sentencing judge to consider an advisory jury verdict, where the jury recommended life imprisonment without parole, but the judge concluded that the aggravating circumstance that the murder was committed for pecuniary gain outweighed the mitigating circumstances, since (1) the Eighth Amendment does not require a state to define the weight that a judge must accord an advisory verdict, and (2) the Constitution permits a judge, acting alone, to impose a capital sentence, and thus is not offended when a state further requires a judge to consider a jury's recommendation and trusts the judge to give proper weight to such recommendation. Harris v. Alabama, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004, 1995 U.S. LEXIS 1623 (U.S. 1995).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by vesting original jurisdiction in the circuit court when a person under 18 years of age is charged with a capital offense, rather than requiring a certification proceeding in youth court for transfer to the circuit court; Mississippi law allows a capital murder defendant who is under the age of 18 years to request a special hearing to consider his or her age, lack of prior offenses, likelihood of successful rehabilitation and other factors which favor sending the case to the youth court rather than continuing in circuit court. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

Mississippi procedure does not violate the constitutional prohibition against cruel and unusual punishment by its failure to explicitly state a minimum age that a person may be subject to the death penalty, since the age at which one may receive a death sentence for the crime of capital murder is implied; no one under 13 years of age may receive the death penalty because a child under the age of 13 cannot even be charged with a felony. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in subsections (6)(b), (f) and (g) of this section and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from giving effect to evidence which they believe calls for sentence less than death, even if all jurors agree that mitigating circumstance exists, unless jurors unanimously find existence of same mitigating circumstance. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369, 1990 U.S. LEXIS 1179 (U.S. 1990).

State death penalty statute mandating death sentence if jury finds at least one aggravating circumstance and no mitigating circumstances satisfies the requirements of the Eighth Amendment and does not violate Amendment's requirement of individualized sentencing, because presence of aggravating circumstances serves purpose of limiting class of death-eligible defendants, and Amendment does not require that aggravating circumstances be further refined or weighed by jury, rather, requirement of individualized sentencing in capital cases is satisfied by allowing jury to consider all relevant mitigating evidence. Blystone v. Pennsylvania, 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255, 1990 U.S. LEXIS 1177 (U.S. 1990).

Imposition of death penalty for crimes committed at age 16 or 17 is not mode or act of punishment that was considered cruel and unusual at time Bill of Rights was adopted, and there is no modern national consensus forbidding imposition of death penalty for crimes committed at those ages. Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306, 1989 U.S. LEXIS 3195 (U.S. 1989), overruled in part, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, 2005 U.S. LEXIS 2200 (U.S. 2005).

Death sentence for mentally retarded accused was not categorically prohibited by Eighth Amendment, but accused is entitled to instruction as to mitigating effect of mental retardation and childhood abuse. Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256, 1989 U.S. LEXIS 3148 (U.S. 1989).

Application of state death penalty statute to homicide defendant who was 15-years-old at time of offense, following trial as adult which resulted in conviction of first-degree murder, violates cruel and unusual punishment clause of Eighth Amendment, according to plurality of U.S. Supreme Court. Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702, 1988 U.S. LEXIS 3028 (U.S. 1988).

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127, 1987 U.S. LEXIS 1808 (U.S. 1987).

Miss. Code § 97-3-21 and this section are not unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution on the ground that they do not allow the jury to sentence a defendant to life imprisonment without parole, since the legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, was unquestionably within their proper discretion. Smith v. State, 419 So. 2d 563, 1982 Miss. LEXIS 2112 (Miss. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803, 1983 U.S. LEXIS 4278 (U.S. 1983).

This section does not impose cruel and unusual punishment. Nor does it unconstitutionally shift the burden of proof during the sentencing phase by requiring a defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed, since there is no requirement that the jury impose death when aggravating circumstances are shown and mitigating circumstances are not; proof of aggravating circumstances may still be found insufficient by the jury to require death and the state still carries the burden of showing not only aggravating circumstances, but that the circumstances are sufficient to warrant death. Furthermore, this section is not unconstitutional for failing to provide guidelines for appellate review, since a comparison with other cases where the death penalty was upheld is constitutionally adequate and comparison with cases of life imprisonment is not required; the use of the "especially heinous, atrocious, or cruel" aggravating circumstances is not vague, overbroad or violative of the Fifth Amendment, and the statute does not unconstitutionally allow unlimited evidence at the sentencing stage, since evidence is limited to the aggravating circumstances listed in the statute. Coleman v. State, 378 So. 2d 640, 1979 Miss. LEXIS 2542 (Miss. 1979).

28. Life sentence.

Statute was not applicable to a hearing to determine whether a sentence of life imprisonment without the possibility of parole was to be imposed upon a juvenile who committed capital murder. Thus, a jury was not required in such hearings. Cook v. State, 242 So. 3d 865, 2017 Miss. App. LEXIS 448 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1269, 2018 Miss. LEXIS 139 (Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 787, 202 L. Ed. 2d 568, 2019 U.S. LEXIS 181 (U.S. 2019).

Trial court correctly sentenced defendant to life without parole because the evidence was sufficient to find defendant guilty of capital murder (as a principal or an accessory) and parole was not an option where the jury was allowed to find defendant guilty of capital murder whether he or his girlfriend was the driver of the truck that hit the sheriff and defendant confessed that he saw uniformed deputies at a blocked intersection and that he "nudged" one of them. Baxter v. State, 177 So. 3d 423, 2014 Miss. App. LEXIS 413 (Miss. Ct. App. 2014), aff'd, 177 So. 3d 394, 2015 Miss. LEXIS 389 (Miss. 2015).

Miss. Code Ann. § 97-3-21 was not unconstitutionally vague and did not apply to the inmate where the inmate confused parole with conditional release as: (1) Miss. Code Ann. § 47-7-3(1)(f) prohibited parole for an inmate sentenced to life under Miss. Code Ann. § 99-19-101 for capital offenses; (2) since the inmate pled guilty to murder, carrying a life sentence, he was convicted of an other capital offense under Miss. Code Ann. § 1-3-4; and (3) the inmate was eligible to petition for conditional release at age 65 under Miss. Code Ann. § 47-5-139(1)(a). Higginbotham v. State, 114 So. 3d 9, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. 2012), cert. denied, 116 So. 3d 1072, 2013 Miss. LEXIS 317 (Miss. 2013).

29. Invalid or improper aggravating circumstance.

Death-sentenced Mississippi inmate was not entitled to federal habeas relief under 28 U.S.C.S. § 2254 following his murder for hire conviction; although the introduction of a prior Texas statutory rape conviction as a prior violent felony aggravating factor under Miss. Code Ann. § 99-19-101(5)(b) was improper, the error was harmless. Considering the entire record, the absence of any significant mitigating circumstances, the presence of two valid aggravating circumstances, and the Brecht standard, there was no reasonable possibility that the erroneous submission of the prior violent felony aggravator during the punishment phase substantially affected or influenced the jury. Nixon v. Epps, 405 F.3d 318, 2005 U.S. App. LEXIS 5219 (5th Cir. Miss.), cert. denied, 546 U.S. 1016, 126 S. Ct. 650, 163 L. Ed. 2d 528, 2005 U.S. LEXIS 8406 (U.S. 2005).

Defendant in capital case failed to demonstrate substantial need at resentencing for neurological exam to determine brain damage that would support mitigating circumstance of inability to appreciate criminality of conduct, where affidavit of forensic psychologist submitted by defendant contained no diagnosis that defendant was suffering from any mental disorder whatsoever. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Capital murder defendant was procedurally barred by res judicata from raising in application for postconviction collateral relief issue, which was raised or should have been raised at trial or in direct appeal, as to whether defense counsel's failure to object to aggravating circumstances at penalty phase constituted ineffective assistance of counsel; procedural bar applied to aggravating circumstances, which did not get special treatment. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

A capital murder defendant's motion for a new sentencing hearing would be granted where the defendant sought relief based on the use of an unconstitutionally vague sentencing instruction defining the "especially heinous" aggravating circumstance. Davis v. State, 655 So. 2d 864, 1995 Miss. LEXIS 218 (Miss. 1995).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that Maynard v. Cartwright (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and Clemons v. Mississippi (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-

39-27(9). Smith v. State, 648 So. 2d 63, 1994 Miss. LEXIS 666 (Miss. 1994).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. Woodward v. State, 635 So. 2d 805, 1993 Miss. LEXIS 442 (Miss. 1993); Stringer v. State, 638 So. 2d 1285, 1994 Miss. LEXIS 333 (Miss. 1994).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion for a new sentencing hearing would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. Wiley v. State, 635 So. 2d 802, 1993 Miss. LEXIS 439 (Miss. 1993).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as this section, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. Wilcher v. State, 635 So. 2d 789, 1993 Miss. LEXIS 447 (Miss. 1993).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance-which was found to be unconstitutionally vague-or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling Johnson v. State (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) Johnson v. State, 547 So. 2d 59, 1989 Miss. LEXIS 356 (Miss. 1989), overruled, Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992), but see Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

Even if the trial judge improperly admitted evidence of the defendant's prior armed robbery conviction during the sentencing phase of his trial, the sentence of death would be affirmed where there were 3 other aggravating circumstances found by the jury pursuant to subsection (5) of this section. Cabello v. State, 524 So. 2d 313, 1988 Miss. LEXIS 92 (Miss. 1988).

30. —Appellate court's right to reweigh.

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

The State Supreme Court was required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance-which was found to be unconstitutionally vague-or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling Johnson v. State (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) Johnson v. State, 547 So. 2d 59, 1989 Miss. LEXIS 356 (Miss. 1989), overruled, Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992), but see Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in Maynard v. Cartwright (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, Clemons v. Mississippi (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and Maynard and Clemons did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in Godfrey v. Georgia (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

In a state where capital sentencing procedures require the sentencing jury to weigh aggravating circumstances and mitigating factors in order to determine the propriety of a death sentence, an automatic rule by which an appellate court would affirm a death sentence-even though that sentence was based in part on an aggravating circumstance that is found to be invalid-so long as there remained at least one valid aggravating circumstance, would itself be invalid under the Federal Constitution, for such a rule would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

31. Prosecutor's statements to jury, generally.

It is appropriate for the defense to ask for mercy or sympathy in the sentencing phase. It is equally appropriate for the state to further its goal of deterrence by arguing to "send a message" in the sentencing phase. Thorson v. State, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

Prosecutor's comment that medical reports on EEGs and brain scans measured the physical body, in response to defense psychologist's cross-examination testimony at capital sentencing proceeding that medical reports indicating defendant was normal did not rebut psychologist's finding of brain dysfunction because psychologist's tests and medical report tests measured different things, was not plain error. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Taken in context, prosecutor's comment to jury at capital sentencing proceeding, that he was chief law enforcement official for three-county area and took his job seriously, was not improper attempt to use his position to achieve more severe sentence; comment came in context of argument that defendant's actions alone, rather than actions of "dysfunctional" family members, were responsible for his being on trial for capital murder. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Statement of prosecutor on rebuttal during closing argument in capital sentencing proceeding, that he did not criticize defense counsel because they had "tough job" to defend even against death penalty given the facts of case, did not constitute prosecutorial misconduct deflecting jury's attention from real issues in case, but was proper comment on weakness of defense. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Attorneys are to be given wide latitude in making their closing arguments and, given latitude afforded attorneys during closing argument, any allegedly improper prosecutorial comments must be considered in context, considering circumstances of case, when deciding on their propriety. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Comment of prosecutor in resentencing phase of capital murder trial that victim's mother followed the law and let the system take over, and that the system had been at it for eight years, was not shown to be improper as being mention of appellate review, in case in which there had been prior determination of guilt and jury was well aware that case had been around for a while, and statements were made in context of whether people should still believe that justice will prevail. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Statements by prosecutor in closing argument in capital murder case relating to whether jury "had the guts" to impose a death penalty, referring to defendant as an "animal" and stating that if defendant did not receive the death penalty, legislature ought to take it off the books did not constitute reversible error in light of wide latitude generally available to counsel to argue case on closing argument. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Comment by prosecutor in resentencing phase of capital murder trial, in response to defense argument that defendant acting alone could not have killed victim in manner described, that defendant could have done it if victim was drunk or had taken drugs, or if defendant had given her drugs, though not recommended, was not so inflammatory as to necessitate trial court's objecting on its own motion or to require finding of error on appeal as arguing facts not in evidence, in case in which the defense first suggested that someone may have put drugs in victim's drink, in attempt to show that she was in altered state and not completely innocent. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Prosecutor did not impermissibly comment upon failure of capital murder defendant to testify when he told jury, following defendant's speech to jury, that "for 11 months [defendant] had wanted to say something" and "if all he had to say was what he said in those less than 2 minutes he stood here before you, I can see why he hasn't bothered until now"; prosecutor's remarks were in direct response to defendant's attempt to show some degree of remorse. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Capital murder defendant was not prejudiced by prosecutor's statement that the only "correct choice" upon conviction was death penalty; trial court instructed that jury must decide whether defendant should be sentenced to death or to life imprisonment, leaving no question that jurors were fully informed of their options, and jurors were presumed to follow law as instructed. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor did not impermissibly comment on defendant's failure to take the stand during resentencing hearing in capital murder case when he attempted to question witness about defendant's confession given during his guilt phase testimony; trial court refused to allow prosecution to question witness as to defendant's earlier testimony, and at time, defendant had not informed trial court he would not testify during sentencing phase. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Prosecutor's comparison of defendant to Charles Manson at death penalty phase was not so improper as to require reversal; prosecutor did not call defendant names, did not vilify her, did not try to enrage jury, and did not go into details of Manson's crimes. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the district attorney's question during cross-examination of the defendant asking whether the thought of the victim having a Christian burial ever crossed his mind, and the district attorney's reference to a Christian burial during his closing argument did not constitute error. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

Although the trial court properly condemned the conduct of a district attorney in asking jurors during voir dire whether or not they would vote guilty if the state proved its case and whether they would vote for death if the state proved that the aggravating circumstances outweighed the mitigating circumstances, the district attorney's conduct did not constitute reversible error where, in context with the jury instructions given to the jury by the trial judge, it was clear that the jurors were aware of their proper role in determining guilt and sentence. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. Stringer v. State, 500 So. 2d 928, 1986 Miss. LEXIS 2609 (Miss. 1986).

32. —Future crimes, future dangerousness or possibility of parole.

Prosecutor's comment during closing argument of capital murder case that jury did not know whether defendant's violent actions were "one-time thing" was supported by medical experts' testimony that, if defendant were under influence of alcohol, he could perpetuate another violent crime, that defendant had alcoholic tendencies, and that success rate for recovering substance abusers was very low. Wiley v. State, 691 So. 2d 959, 1997 Miss. LEXIS 43 (Miss.), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153, 1997 U.S. LEXIS 5706 (U.S. 1997).

A trial court erred when it allowed the prosecutor to repeatedly explore the defendant's propensity for future crimes during the sentencing phase of a capital murder prosecution, since propensity to commit future crimes is not one of the 8 aggravating circumstances authorized by subsection (5) of this section. Balfour v. State, 598 So. 2d 731, 1992 Miss. LEXIS 131 (Miss. 1992).

Prosecutor's introduction of defendant's potential future dangerousness did not go beyond provisions of this section where defense counsel first introduced defendant's potential for future dangerousness and where subsection (5)(b) of this section implicitly poses inquiry into future dangerousness by asking jury to determine whether defendant had been previously convicted of felony involving violence to person. Gilliard v. Scroggy, 847 F.2d 1141, 1988 U.S. App. LEXIS 8831 (5th Cir. Miss. 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 807, 1989 U.S. LEXIS 61 (U.S. 1989).

A prosecutor's comments in closing argument during the sentencing phase of a capital case suggesting that prisoners and guards might be in danger if the defendant were to receive a life sentence rather than the death penalty were not improper. Woodward v. State, 533 So. 2d 418, 1988 Miss. LEXIS 492 (Miss. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202, 1989 U.S. LEXIS 2004 (U.S. 1989).

A prosecutor's argument in the sentencing phase of a capital case regarding the possibility of the defendant being paroled and the fact that another murder defendant had committed murder after being paroled from a life sentence constituted reversible error. The argument regarding parole introduced an arbitrary factor into the sentencing process proscribed by § 99-19-105(3)(a). Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

33. —Finality of decision or appellate process.

In a capital murder case, a court did not commit error in sending the jury to deliberate further where a document retrieved from the jury room trash can was not submitted by the jury to the trial court as a verdict and was not submitted on post-trial motion to the trial court, where the only reason the court of appeals was aware of it was because the defense attorney had it added to the court papers after the trial. Thus, the only verdict actually given to the court was the one sentencing defendant to death. Scott v. State, 878 So. 2d 933, 2004 Miss. LEXIS 650 (Miss. 2004).

Comment of prosecutor in resentencing phase of capital murder trial that victim's mother followed the law and let the system take over, and that the system had been at it for eight years, was not shown to be improper as being mention of appellate review, in case in which there had been prior determination of guilt and jury was well aware that case had been around for a while, and statements were made in context of whether people should still believe that justice will prevail. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

A prosecutor's mention of appellate review during the sentencing phase of a capital case might well have lessened the jurors' sense of responsibility and therefore constituted reversible error. Furthermore, the prosecutor's insinuation that capital murderers monopolize judicial resources and are coddled by appellate courts may have introduced an arbitrary factor proscribed by § 99-19-105. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

In the sentencing phase of a capital case, the defense counsel's single objection which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

When prosecutor seeks to rebut defense counsel's effort to impress upon sentencing jury enormity of decision to impose death penalty by informing jury that decision will be subject to automatic appellate review, sentence of death imposed by jury must be vacated. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231, 1985 U.S. LEXIS 96 (U.S. 1985).

34. —Victim.

In the sentencing phase of a prosecution for murder, it was not error for the state to note in its closing that injustice would be hard to bear by the family and friends of the victim or to ask the rhetorical question of whether it was justice if the defendant was able to sit in jail reading, sleeping, and watching television. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

References in prosecutor's closing argument in resentencing phase of capital murder case to victim's family, in what could be called victim impact statement, were not improper. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Comment of prosecutor in resentencing phase of capital murder trial that victim's mother followed the law and let the system take over, and that the system had been at it for eight years, was not shown to be improper as being mention of appellate review, in case in which there had been prior determination of guilt and jury was well aware that case had been around for a while, and statements were made in context of whether people should still believe that justice will prevail. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

Comments made by a prosecutor during his closing argument in a capital murder prosecution did not constitute prosecutorial misconduct, where the prosecutor stated that the victim was a human being and had a right to be protected by the law even though he may not have been wealthy or prominent or a leader in his community, in spite of the defendant's argument that the "value" of the victim's life should not be a factor in considering whether the defendant should live or die and that such a consideration introduces an arbitrary factor into the process, since the prosecutor's statement was innocuous. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

35. Harmless error.

In defendant's capital murder trial, the language on the verdict form stating that "if the jury cannot agree on punishment, the court must sentence the defendant to a term of life imprisonment with the possibility of parole" was improper because it was an incorrect statement of law since a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. However such error was harmless because the jury, knowing that it had the life without parole option, chose to impose the death penalty upon defendant. Hodges v. State, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

36. Psychological testimony.

Forensic psychologist who gave opinion that neurological examination was needed to determine if defendant in capital case had brain damage that limited his ability to appreciate criminality of his conduct could be cross-examined at resentencing on basis for that opinion, even if cross-examination brought out information from otherwise privileged medical records; when defendant placed his mental condition in issue, he waived privilege to medical records relied on by psychologist. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Defendant was precluded, at remand for resentencing in capital murder case, from moving to exclude, as speculative, testimony by forensic pathologist as to suffering endured by victim was not error, where objection was not raised during guilt phase. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Testimony by forensic pathologist as to suffering endured by victim, taken during guilt phase of capital murder prosecution and reintroduced at resentencing, was not rank speculation and was admissible; state demonstrated that pathologist's testimony fell within bounds of forensic pathology by showing that his expertise dealt with wounds, suffering, and means of inflicting injury. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Refusal to permit defense psychologist to testify at capital sentencing proceeding as to what brain scans and EEGs measure, was abuse of discretion; though psychologist was not trained to read brain scans or EEG results, he knew what those tests measured. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Trial court acted within its discretion at death penalty phase of trial in excluding, as irrelevant, psychological report that allegedly showed that it was probable that accomplice, rather than defendant, was mastermind behind robbery and murder of victim, in absence of evidence that accomplice had any kind of dominating influence over defendant. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the introduction of a state psychologist's testimony that it was her opinion that the defendant was not psychotic or mentally ill, did not violate the defendant's Sixth Amendment right to counsel where the defendant's attorney requested the psychiatric examination, the defendant testified that he wanted to have a psychiatric evaluation to determine whether he knew right from wrong, and presumably the defendant had consulted with his attorney about the nature of the psychiatric examination. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily lead. State v. Tokman, 564 So. 2d 1339, 1990 Miss. LEXIS 232 (Miss. 1990).

A trial court committed reversible error during the sentencing phase of a capital case in permitting the prosecutor to use a psychiatric evaluation to cross-examine a defense witness in violation of the Sixth Amendment right to confront witnesses where the doctors who wrote the evaluation were not called for trial and could not be cross-examined by the defendant. Lanier v. State, 533 So. 2d 473, 1988 Miss. LEXIS 523 (Miss. 1988).

In a prosecution for capital murder, the trial court properly refused an instruction permitting the jury to consider defendant's diminished capacity to appreciate the criminality of his conduct, pursuant to subsection (6)(f) of this section, in the absence of any expert testimony suggesting that defendant was mentally retarded or that he was suffering from a mental disorder, disease or defect. Williams v. State, 445 So. 2d 798, 1984 Miss. LEXIS 1578 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795, 1985 U.S. LEXIS 471 (U.S. 1985).

37. Ineffective assistance of counsel.

Where defendant was convicted of capital murder in course of kidnapping and sentenced to death, he was not entitled to habeas relief based on his ineffective assistance of counsel claim. There was no reason to think that better rebuttal of investigator's testimony would have affected jury's findings regarding aggravating factors; in addition to "especially heinous, atrocious, or cruel" factor, jury also found that two other statutory aggravating circumstances were present: crime was committed during kidnapping and for pecuniary gain. Jordan v. Epps, 756 F.3d 395, 2014 U.S. App. LEXIS 11953 (5th Cir. Miss. 2014), cert. denied, 576 U.S. 1071, 135 S. Ct. 2647, 192 L. Ed. 2d 948, 2015 U.S. LEXIS 4252 (U.S. 2015).

In a capital case, defense counsel was not deficient for waiving jury sentencing because counsel acted in accordance with defendant's instructions where defendant adamantly advised counsel that they were not to cross-examine witnesses for the State or to object to the introduction of evidence presented by the State. Loden v. State, 43 So. 3d 365, 2010 Miss. LEXIS 204 (Miss. 2010).

Assuming that the state inmate's attorneys were ineffective during resentencing in his capital murder case for opening the door to allow in evidence of the inmate's prior bad acts and for failing to object to the State's invocation of prior bad acts in its closing statement, the inmate was unable to show that he was prejudiced by his attorneys' alleged errors; in accordance with Miss. Code Ann. § 99-19-101, the sentencing jury was instructed to recommend the death sentence only if it found that the presence of the statutorily provided aggravating factors outweighed the presence of the statutorily provided mitigating factors. The jury listed three aggravating factors–that the capital murder occurred during the commission of rape, that the murder was particularly heinous, and that the offense was committed for the purpose of avoiding arrest or effecting escape from custody; evidence of the inmate's alleged prior bad acts would have had no bearing on the jury's findings regarding these three aggravating factors. Woodward v. Epps, 580 F.3d 318, 2009 U.S. App. LEXIS 19065 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1071, 130 S. Ct. 2093, 176 L. Ed. 2d 729, 2010 U.S. LEXIS 3297 (U.S. 2010).

Defense counsel was not ineffective for failing to submit Miss. Code Ann. § 99-19-101(6)(b), (d)-(f) factors during the penalty phase because (1) defendant was not under the influence of extreme mental or emotional disturbance; (2) defendant's participation in the robbery and murder was not relatively minor because he told the police that he played an active role in the robbery and murder; (3) there was no showing of extreme distress or domination either at trial or in the post-trial filings; and (4) defendant had the ability to understand the nature and quality of his alleged acts and to understand the difference between right and wrong at the time. Branch v. State, 882 So. 2d 36, 2004 Miss. LEXIS 586 (Miss. 2004), cert. denied, 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289 (U.S. 2005).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at punishment stage to object to robbery aggravator on ground that aggravating circumstance unconstitutionally duplicated element of offense of capital murder because jury found that defendant committed capital murder in commission of crime of robbery; Supreme Court had already rejected that contention and, thus, there was no reason for counsel to object to underlying felony being counted as aggravator. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at sentencing phase to object to double use of robbery and pecuniary gain aggravating circumstances; defendant's trial took place before effective date of later state Supreme Court decision prospectively prohibiting double counting for same conduct and, thus, defense counsel had no basis to object. Foster v. State, 687 So. 2d 1124, 1996 Miss. LEXIS 216 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996, 1997 U.S. LEXIS 3936 (U.S. 1997).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. Woodward v. State, 635 So. 2d 805, 1993 Miss. LEXIS 442 (Miss. 1993).

A defense counsel's performance at the sentencing phase of a capital murder prosecution constituted ineffective assistance of counsel where the defendant faced a potential death penalty, and the defense counsel failed to conduct any investigation at all in a search for mitigation evidence; the defense counsel conducted little or no investigation into the defendant's background, he spent negligible time interviewing the defendant and preparing a defense, he made no effort to contact or interview any potential character witnesses other than the defendant's mother who was contacted only after the trial had commenced, and the lack of preparation left the defense counsel unable to blunt the prosecution's forceful case. At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case; it is critical that mitigating evidence be presented at capital sentencing proceedings. Psychiatric and psychological evidence is crucial to the defense of a capital murder case, and there is a critical interrelation between expert psychiatric assistance and minimally effective representation. Thus, the defendant's counsel was unreasonable in not pursuing psychological evidence in support of the defense that the defendant was under the domination of his accomplice where evidence was presented in the post-conviction proceeding that the defendant was immature, dependent and easily lead. State v. Tokman, 564 So. 2d 1339, 1990 Miss. LEXIS 232 (Miss. 1990).

If capital murder defendant shows that failure of trial defense counsel to call favorable, willing witnesses during penalty phase of trial and failure to investigate and present psychological evidence resulted in ineffective assistance of counsel, death penalty will be vacated and new trial set as to sentencing only. Leatherwood v. State, 473 So. 2d 964, 1985 Miss. LEXIS 2182 (Miss. 1985).

38. Racial discrimination in application of death penalty.

Defendant was not entitled to make racial arguments against death penalty during sentencing phase of capital murder case, where defendant made no claim of racial bias, presented no proof of racial bias, and was not faced with any potential bias on basis of race of his victims. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Capital murder defendant was not entitled to make racial arguments against death penalty, even if racial arguments to jury are appropriate, in absence of racial bias claims, proof of bias, and in absence of any potential bias on basis of race of victims. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

39. Sentencing hearing.

In the sentencing portion of petitioner inmate's bifurcated trial for capital murder, pursuant to Miss. Code Ann. § 99-19-101(1), the inmate did not have the right to present evidence–specifically evidence that he did not commit rape–that was inconsistent with the verdict of the guilt-phase jury. Under Miss. Code Ann. § 97-3-19(2)(e), of which the inmate was convicted, the commission of the crime of rape was an element of capital murder. Holland v. Anderson, 583 F.3d 267, 2009 U.S. App. LEXIS 20769 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1073, 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429 (U.S. 2010).

Petitioner state death row inmate was not denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights when the trial court improperly denied his pretrial motion and later request to delay the sentencing phase of his trial, since Miss. Code Ann. § 99-19-101(1) required the trial court to conduct the sentencing hearing as soon as practicable and a review of the events at trial showed that the trial judge, while he may have expressed impatience and a desire to hurry during some portions of the trial, wanted to give the jury ample time to consider the appropriate sentence. Stevens v. Epps, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), aff'd, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

40. Alternate juror in sentencing phase.

Seating of an alternate juror during the sentencing phase did not violate Mississippi's capital sentencing scheme, as Miss. Code Ann. § 13-5-67, allowed the substitution of alternative jurors in capital cases. Evans v. State, 226 So. 3d 1, 2017 Miss. LEXIS 249 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

41. Resentencing.

In a capital murder case in which defendant, who was 17 years and eight months old when he committed the offense, filed a motion for post-conviction relief in which he sought to be resentenced to a term of life imprisonment with eligibility for parole based on Miller, defendant's request for a jury was properly denied because his conviction and sentence were already final when Miller was decided; and he was afforded an opportunity to show that he was entitled to post-conviction relief under Miller in the form of a full evidentiary hearing. Martin v. State, — So. 3d —, 2020 Miss. App. LEXIS 49 (Miss. Ct. App. Feb. 18, 2020).

While an individualized sentencing hearing was required when defendant was resentenced for capital murders which defendant committed while a juvenile, there was no statutory right to a jury for that hearing. Furthermore, defendant was orignially sentenced by a jury upon defendant's conviction for the capital murders. McGilberry v. State, 292 So. 3d 199, 2020 Miss. LEXIS 10 (Miss. 2020).

Defendant was entitled to resentencing by a jury because he was convicted of capital murder and sentenced under the statute, and the court remanded for a Miller v. Alabama resentencing by a jury; the Miller sentencing hearing would allow the sentencing authority to decide whether to sentence defendant to life with or without eligibility for parole, and thus the court could not say that remanding for the appropriate sentencing authority, the jury, would be a meaningless, procedural step elevating form over function. McGilberry v. State, — So. 3d —, 2019 Miss. App. LEXIS 21 (Miss. Ct. App. Jan. 15, 2019), rev'd, 292 So. 3d 199, 2020 Miss. LEXIS 10 (Miss. 2020).

Juvenile was not entitled to Miller resentencing before a jury because (1) the statute was complied with at the juvenile's original sentencing, and (2) an order granting the juvenile leave to file a post-conviction relief motion did not grant the juvenile's request to vacate the juvenile's life-without-parole sentence. Wharton v. State, 298 So. 3d 921, 2019 Miss. LEXIS 407 (Miss. 2019).

Juvenile's sentence of life without parole after a Miller resentencing was not an abuse of discretion because the court considered characteristics and circumstances unique to juveniles, as Miller required, and, having satisfied the court's Miller obligation, did not abuse the court's discretion in denying relief from a previously imposed sentence of life without parole. Wharton v. State, 298 So. 3d 921, 2019 Miss. LEXIS 407 (Miss. 2019).

Defendant's resentencing, after defendant received a life-without-parole sentence that violated the constitutional prohibition on cruel and unusual punishment, should have been decided by a jury, not a trial court, because defendant was convicted of a capital murder that defendant committed while under the age of 18 and sentenced under a statute, which prescribed sentencing solely by a jury. Wharton v. State, — So. 3d —, 2018 Miss. App. LEXIS 490 (Miss. Ct. App. Oct. 2, 2018), rev'd, 298 So. 3d 921, 2019 Miss. LEXIS 407 (Miss. 2019).

Prohibiting defendant from introducing exculpatory evidence at resentencing for capital murder following affirmance of conviction, while permitting state to introduce evidence impacting on guilt in order to prove at least one Enmund factor demonstrating intent to kill, did not constitute a de facto directed verdict against defendant. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Introduction of capital murder conviction at resentencing following affirmance of conviction was not error; resentencing proceeding was not a separate trial from guilt determination as asserted by defendant, and even if it were, admission of verdict was permitted if relevant to an aggravator or to an Enmund factor bearing on intent to kill. (Per Smith, J., with three Justices concurring, and Chief Justice and two Justices concurring in result.) Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

Color photographs of victim were admissible at resentencing following affirmance of capital murder conviction; defendant was already identified as guilty party based not only upon conviction but upon his confession and physical evidence, and evidence was relevant to establish that murder was committed during commission of a rape and to prove heinous, atrocious, and cruel aggravator. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

II. UNDER FORMER § 99-19-13.

42. In general.

During the sentencing phase of a murder trial, evidence that the defendant had declared bankruptcy and was separated from his wife was admissible to rebut the defendant's testimony that he had a steady job and loved his family. Cole v. State, 525 So. 2d 365, 1987 Miss. LEXIS 2655 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348, 1988 U.S. LEXIS 4775 (U.S. 1988).

This section [Code 1942, § 2536] is not unconstitutional in providing for the fixing of the punishment in murder cases by the same jury that determines guilt. Capler v. State, 237 So. 2d 445, 1970 Miss. LEXIS 1509 (Miss. 1970), vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754, 1972 U.S. LEXIS 1910 (U.S. 1972).

It is not necessary that the same jury that rendered the verdict of guilty against a defendant indicted for murder shall also determine the question of his punishment. Irving v. State, 228 So. 2d 266, 1969 Miss. LEXIS 1382 (Miss. 1969), vacated, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751, 1972 U.S. LEXIS 2304 (U.S. 1972).

In a prosecution for rape, the trial court did not err in accepting accused's plea of guilty and fixing his punishment at life imprisonment without impaneling a jury, and no constitutional right of the accused was violated thereby. Bullock v. Harpole, 233 Miss. 486, 102 So. 2d 687, 1958 Miss. LEXIS 406 (Miss. 1958).

On murder conviction, it is within the province of the jury to fix the penalty at death or life imprisonment. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

The power of the jury under the statute is independent of the evidence. Spain v. State, 59 Miss. 19, 1881 Miss. LEXIS 66 (Miss. 1881).

If the jury agree on defendant's guilt but cannot agree on the punishment, it should return a general verdict of guilty. Green v. State, 55 Miss. 454, 1877 Miss. LEXIS 158 (Miss. 1877); Fleming v. State, 60 Miss. 434, 1882 Miss. LEXIS 77 (Miss. 1882).

43. Instructions.

Under Code 1892, § 1439 [Code 1942, § 2536], it is not error in a prosecution for homicide for the court to refuse to compel the state to instruct the jury that if they find defendant guilty, the death penalty will follow unless they fix the punishment at imprisonment in the penitentiary, where such an instruction is given at the instance of accused. Evans v. State, 87 Miss. 459, 40 So. 8, 1905 Miss. LEXIS 166 (Miss. 1905).

In a murder case a jury agreeing as to the guilt but not as to the punishment must under this section [Code 1942, § 2536] return a verdict of guilty and the court may so instruct. West v. State, 80 Miss. 710, 32 So. 298, 1902 Miss. LEXIS 313 (Miss. 1902).

If no instruction on the subject is asked, it is not ground for reversal of a conviction that the court failed to give an instruction on the consequences of a failure by the jury to affix the punishment. Penn v. State, 62 Miss. 450, 1884 Miss. LEXIS 102 (Miss. 1884).

The jury should be instructed not only as to its power but as to the consequences of a failure to affix the punishment. Walton v. State, 57 Miss. 533, 1879 Miss. LEXIS 108 (Miss. 1879).

44. Qualifications of jurors.

Where, after conviction of the defendant on an indictment for murder, it was found by the court that in excusing jurors expressing scruples against imposition of the death penalty the rules in such cases provided had been violated, a new jury trial could be granted on the sole issue of punishment, without a new trial on the issue of defendant's guilt. Irving v. State, 228 So. 2d 266, 1969 Miss. LEXIS 1382 (Miss. 1969), vacated, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751, 1972 U.S. LEXIS 2304 (U.S. 1972).

In a homicide prosecution, where the state was permitted to challenge for cause three jurors who expressed conscientious scruples against imposing the death penalty, an order sentencing the defendant to death must be reversed; upon reversal of the order, the trial judge must remand for a new trial as to punishment, or if the district attorney and the trial judge should so agree, might sentence the defendant to life imprisonment without the intervention of the jury. Rouse v. State, 222 So. 2d 145, 1969 Miss. LEXIS 1523 (Miss. 1969).

Jurors in murder prosecution who have conscientious convictions against inflicting the death penalty are not qualified. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

In qualifying the jurors in murder prosecution, it is the duty of the judge to inquire of the jurors, and the duty of the jurors to answer under oath, whether they have conscientious convictions against inflicting the death penalty. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

No set words or phrases are required or prescribed in propounding question to prospective jurors in murder prosecution whether they have conscientious convictions against inflicting death penalty. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

The court, in a capital case, should exclude from the jury persons who state they have conscientious scruples against capital punishment. Borowitz v. State, 115 Miss. 47, 75 So. 761, 1917 Miss. LEXIS 183 (Miss. 1917).

45. Sentence and punishment.

State statute which imposed mandatory death penalty for first-degree murder, which included any willful, deliberate, and premeditated killing, and any murder committed in perpetrating or attempting to perpetrate a felony, constituted a violation of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944, 1976 U.S. LEXIS 85 (U.S. 1976).

Imposition of death penalty did not constitute cruel and unusual treatment under statutes which provided (1) if defendant is found guilty of first degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to 8 aggravating and 7 mitigating circumstances specified in said statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its functions to be guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 1976 U.S. LEXIS 83 (U.S. 1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) capital homicides are limited to intentional and knowing murders committed in the five specified situations of murder of a peace officer or fireman, murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson, murder committed while escaping or attempting to escape from a penal institution, murder committed for remuneration, and murder committed by a prison inmate when the victim is a prison employee; (2) if a defendant is convicted of a capital offense, a separate presentence hearing must be held before the jury, where any relevant evidence may be introduced and arguments may be presented for or against the death sentence; (3) the jury must answer the questions (a) whether or not the defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether or not the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal. Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929, 1976 U.S. LEXIS 84 (U.S. 1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statute must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may elect to impose the death sentence on a defendant convicted of murder, the trial judge and jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859, 1976 U.S. LEXIS 82 (U.S. 1976).

Where trial judge inadvertently omitted to impose sentence after verdict of jury fixing punishment at life imprisonment, cause was required to be remanded to trial court in order that sentence might be imposed of record by judgment in accordance with the verdict, as required by statute. Harris v. State, 46 So. 2d 923 (Miss. 1950).

Sentence by the trial court must be in open court and recorded in the minutes at a special or regular term thereof, and it cannot be done in vacation, even by consent, nor would a dismissal of the appeal validate such sentence, when imposed in vacation. Harris v. State, 46 So. 2d 923 (Miss. 1950).

Motion for new trial in prosecution for homicide on ground of compromise verdict was held properly denied although verdict certified that jury was unable to agree as to punishment since the record did not show defendant offered any juror as witness to sustain his motion but simply filed an unsworn motion for new trial averring that no member of the jury voted for death sentence and that there was no disagreement among the jurors as to the punishment and since members of the jury cannot be offered as witnesses to impeach their own verdict. Calvin v. State, 206 Miss. 94, 39 So. 2d 772, 1949 Miss. LEXIS 245 (Miss. 1949).

Where defendants had been convicted of murder and sentenced to death, the supreme court had no power to reverse and remand the case on the mere ground that another jury might fix the punishment at life imprisonment because of the youth and indiscretion of defendants, as the exercise of clemency is vested in the executive. Shimniok v. State, 197 Miss. 179, 19 So. 2d 760, 1944 Miss. LEXIS 289 (Miss. 1944).

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Admissibility of expert testimony as to appropriate punishment for convicted defendant. 47 A.L.R.4th 1069.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved or the like–post-Gregg cases. 63 A.L.R.4th 478.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like–post-Gregg cases. 64 A.L.R.4th 755.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like–post-Gregg cases. 64 A.L.R.4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like–post-Gregg cases. 65 A.L.R.4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like–post-Gregg cases. 66 A.L.R.4th 417.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like–post-Gregg cases. 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like–post-Gregg cases. 67 A.L.R.4th 942.

Adequacy of defense counsel's representation of criminal client - conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client – pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 A.L.R.5th 419.

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Note: Evolving Standards of Decency in Mississippi: Chase v. State, Capital Punishment, and Mental Retardation, 25 Miss. C. L. Rev. 221, Spring, 2006.

§ 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing upon recommending death; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravated circumstances enumerated in Section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

HISTORY: Laws, 1977, ch. 458, § 3; Laws, 1994, ch. 566, § 4, eff from and after July 1, 1994.

Editor's Notes — Laws of 1994, ch. 566, § 5, provides as follows:

"SECTION 5. The provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994."

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Conduct of trial in death penalty cases, see MRCrP 19.2.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Aggravating circumstances, generally.
3. —Invalid or improperly defined.
4. —Robbery and pecuniary gain as separate aggravators.
5. —"Especially heinous, atrocious, or cruel".
6. —"Avoiding or preventing lawful arrest or effecting escape from custody".
7. —Reweighing by appellate court.
8. Jury instructions.
9. —Life, without probation or parole.
10. —Weighing of aggravating and mitigating circumstances.
11. —Beyond reasonable doubt.
12. Habitual offender.
13. Cruel and unusual punishment.
14. Reasonable time for deliberations.
15. Sentence by court.

1. In general.

In defendant's capital murder trial, the language on the verdict form stating that "if the jury cannot agree on punishment, the court must sentence the defendant to a term of life imprisonment with the possibility of parole" was improper because it was an incorrect statement of law since a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. However such error was harmless because the jury, knowing that it had the life without parole option, chose to impose the death penalty upon defendant. Hodges v. State, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

Statute applicable to capital cases which provides that if jury cannot, within a reasonable time, agree as to punishment, judge shall dismiss jury and impose sentence of life imprisonment does not allow jury to determine what constitutes "reasonable time" for deliberations and to report its findings to court. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Even if jury had never been instructed on what would happen if they could not agree on sentence, there would have been no error. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

It is suggestive to provide signature line only under the verdict for death penalty. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Verdict form which provided for signature only under the death penalty and not under life sentence verdict was harmless where jury was instructed prior to deliberations that death penalty was not the only option. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L.

Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Mental retardation is not a bar to execution of one convicted of capital murder, but is only a mitigating circumstance. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury was not required to find that aggravating circumstances outweighed mitigating circumstances beyond reasonable doubt before imposing death penalty. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

2. Aggravating circumstances, generally.

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Individual can have prior conviction involving use of threat or violence and yet not be under sentence of imprisonment, and individual can be under sentence of imprisonment and yet not have prior conviction involving use of threat or violence, so that both aggravating circumstances may be used, even when they are based on the same offense. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment charging defendant with aggravated assault was best evidence to prove that defendant had been convicted of felony involving use of threat or violence, provided that it was properly certified. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment which bore signature of county clerk who attested to its origins was properly certified and thus admissible in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Indictment which led to defendant's conviction for aggravated assault was relevant in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence and to prove that defendant was under sentence of imprisonment at the time of the murder with which he was charged. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Prosecution had no burden to bear with respect to proof that aggravated assault was a crime of violence and could be considered as an aggravating circumstance as such in capital murder prosecution, as aggravated assault by its very definition signifies violence. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Finding of aggravating circumstance in death penalty case that defendant was under sentence of imprisonment at time of murder was supported by evidence provided in guilt phase that defendant was on parole for life sentence. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Finding of aggravating factor in death penalty case that defendant had been previously convicted of felony involving use or threat of violence was supported by evidence that defendant had previously been convicted of murder and aggravated assault, even though aggravated assault conviction had occurred after murder for which defendant was being sentenced to death. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder while engaged in commission of kidnapping or flight after kidnapping; victim's body was found in car with windows open approximately 2 months after her disappearance, which did not provide sufficient evidence beyond a reasonable doubt that defendant had kidnapped victim. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court committed reversible error in death penalty phase of murder trial by submitting 5 aggravating factors to jury, 3 of which where unsupported by evidence that could substantiate jury's finding of those factors. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Capital murder aggravating circumstance, that defendant knowingly created a "great risk of death to many persons," applied to defendant who stabbed 4 children to death and inflicted life-threatening stab wounds on one adult and another child. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder aggravating factor for when defendant knowingly creates great risk of death to many persons applies when there are multiple victims; aggravating factor is not limited to instances when there is a great risk to those other than intended victims. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Certified copy of indictment and judgment and testimony of police officers present at incident justified use of capital murder defendant's prior violent felony as aggravating circumstance, even if gun used during incident was inoperable and separate kidnapping charges were dropped. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

The new rule announced in Willie v. State (Miss. 1991) 585 So. 2d 660 – that a jury may not "doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators" when determining the sentence to be imposed in a capital murder case – is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

Introduction, at capital sentencing proceeding, of evidence as to defendant's membership in white racist prison gang violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of white victim. Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), on remand, 608 A.2d 1201 (Del. 1992).

3. —Invalid or improperly defined.

A capital murder defendant's motion for a new sentencing hearing would be granted where the defendant sought relief based on the use of an unconstitutionally vague sentencing instruction defining the "especially heinous" aggravating circumstance. Davis v. State, 655 So. 2d 864, 1995 Miss. LEXIS 218 (Miss. 1995).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or conduct a traditional harmless error analysis. Stringer v. State, 638 So. 2d 1285, 1994 Miss. LEXIS 333 (Miss. 1994).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. Woodward v. State, 635 So. 2d 805, 1993 Miss. LEXIS 442 (Miss. 1993).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion for a new sentencing hearing would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. Wiley v. State, 635 So. 2d 802, 1993 Miss. LEXIS 439 (Miss. 1993).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. Wilcher v. State, 635 So. 2d 789, 1993 Miss. LEXIS 447 (Miss. 1993).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that Maynard v. Cartwright (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and Clemons v. Mississippi (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). Smith v. State, 648 So. 2d 63, 1994 Miss. LEXIS 666 (Miss. 1994).

4. —Robbery and pecuniary gain as separate aggravators.

Robbery, by definition, is committed for pecuniary gain and thus robbery and pecuniary gain cannot be used as two separate aggravating circumstances in capital murder prosecution. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in allowing the jury to consider the aggravating factors of "murder committed while in the commission of a robbery" and "murder committed for pecuniary gain" as 2 separate and distinct aggravators. Jenkins v. State, 607 So. 2d 1171, 1992 Miss. LEXIS 576 (Miss. 1992).

5. —"Especially heinous, atrocious, or cruel".

Instruction on aggravator of committing murder in order to avoid arrest was supported in capital sentencing proceeding by evidence that victim was still alive after rape and that defendant then stuffed defendant's panties down her throat, and by evidence that defendant mutilated victim's genital area after she died so that authorities would think a "sex fiend" had committed crime. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

"Heinous, atrocious, or cruel" instruction in capital murder prosecution must be accompanied by appropriate limiting instruction. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Instruction defining "heinous, atrocious, or cruel" murder as one "accompanied by such additional acts as to set the crime apart from the norm of capital murders–the conscienceless of pitiless crime which is unnecessarily torturous to the victim" was sufficient, even though instructions also stated that "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

The "specially heinous" aggravator does not violate Eighth Amendment. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

The "specially heinous" aggravator does not violate Fourteenth Amendment. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury was not entitled to consider aggravating factor in death penalty case that murder committed by defendant was especially heinous, atrocious, or cruel; no evidence was presented to jury as to how crime was actually committed, and even if cause of death was strangulation, as pathologist speculated, there was no evidence how strangulation was carried out and no evidence of any additional acts to set crime apart from norm of capital felonies as conscienceless, pitiless, or unnecessarily torturous. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Aggravating circumstance in death penalty case that murder was especially heinous, atrocious, or cruel may be used only when jury is instructed as to its meaning in manner which will channel jury's discretion. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Jury instruction during sentencing phase of capital murder prosecution, defining especially heinous, atrocious or cruel offense, adequately limited jury's consideration, despite contention that instruction was unconstitutionally overbroad and vague in that it established a multiple choice questionnaire for jurors to contend with. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. Carr

v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in Coleman v. State (Miss. 1979) 378 So. 2d 640. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the conscience-lessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 649 So. 2d 1256, 1994 Miss. LEXIS 496 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422, 1995 U.S. LEXIS 7828 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

In the penalty phase of a capital murder prosecution, the trial court's instruction on the "especially heinous, atrocious or cruel" statutory aggravating circumstance was proper where the court instructed the jury that the term "heinous, atrocious, or cruel" meant "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciouslessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the "heinous, atrocious, or cruel" aggravating factor was inadequate even where the court instructed the jury that the word "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

In the sentencing phase of capital murder case, the jury should be given a limiting instruction as to the meaning of "especially heinous, atrocious or cruel." Lanier v. State, 533 So. 2d 473, 1988 Miss. LEXIS 523 (Miss. 1988).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in Maynard v. Cartwright (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, Clemons v. Mississippi (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and Maynard and Clemons did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in Godfrey v. Georgia (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

6. —"Avoiding or preventing lawful arrest or effecting escape from custody".

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether defendant shot victim in order to avoid or prevent lawful arrest; record was devoid of any reference showing that defendant was disguised when he entered or left store at which shooting took place, and fellow prison inmate claimed that defendant told him that he shot victim because he believed she was stalling and seemed like she was reaching for something. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

If there is evidence from which it may be reasonably inferred that substantial reason for killing was to conceal identity of killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for court to allow jury to consider aggravating circumstance of avoiding or preventing lawful arrest. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder for purpose of avoiding or preventing lawful arrest; there was no evidence that desire to avoid apprehension and arrest was a substantial reason for victim's murder. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

"Avoiding arrest" aggravating factor was properly submitted to jury in penalty phase of capital murder case, even though defendant claimed that arrest avoidance was inherent in every murder, as it by definition eliminated one of the possible witnesses and that further limiting instruction was required to channel jury's focus on situations in which there is specific evidence demonstrating that one of the purposes beyond the killing was desire to avoid detection and apprehension for underlying crime. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Evidence supported avoidance of arrest as aggravating factor in penalty phase of capital murder case; defendant began asking victim if she wanted to live or die from moment that she, defendant and accomplice arrived at lake, he expressly informed accomplice they were going to have to kill victim, after victim was dead defendant doused body with gasoline and burned victim, with special emphasis on hands and pubic area so as to preclude identification through fingerprints, fiber and pubic hair comparisons. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

The aggravating circumstance that the capital murder was committed for the purpose of "avoiding or preventing a lawful arrest" does not apply only to murders of law enforcement officers; thus, the question of whether this aggravating factor should be submitted to the jury does not depend on whether the victim was a law enforcement officer but whether the facts and circumstances prove that avoiding lawful arrest was a motive in the killing. Chase v. State, 645 So. 2d 829, 1994 Miss. LEXIS 116 (Miss. 1994), cert. denied, 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282, 1995 U.S. LEXIS 3828 (U.S. 1995).

The statutory aggravating circumstance that "the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" is properly submitted to the jury if evidence exists from which the jury could reasonably infer that concealing the killer's identity, or covering the killer's tracks to avoid apprehension and arrest, was a substantial reason for the killing. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

7. —Reweighing by appellate court.

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling Johnson v. State (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) Johnson v. State, 547 So. 2d 59, 1989 Miss. LEXIS 356 (Miss. 1989), overruled, Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992), but see Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was "especially heinous, atrocious, or cruel," but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in Maynard v. Cartwright (1988) 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853, Clemons v. Mississippi (1990) 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441, on remand, remanded (Miss) 593 So. 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi's and Maynard and Clemons did not announce "new rule;" fact that Mississippi is a "weighing" state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant's sentence became final, U.S. Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce "new rule" in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in Godfrey v. Georgia (1980) 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367, 1992 U.S. LEXIS 1533 (U.S. 1992).

8. Jury instructions.

Based on jury instructions given and the written verdict delivered in defendant's capital murder case, it was clear that the jury had followed the instructions on the burden of proof applying to a finding of aggravating circumstance, although there was no requirement that the verdict be "beyond a reasonable doubt," and there was no violation of Apprendi or Ring; further, the transcript of the verdict clearly indicated that it had been unanimous, and in compliance with Miss. Code Ann. §§ 99-19-101 and 99-19-103. Grayson v. State, 879 So. 2d 1008, 2004 Miss. LEXIS 721 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1301, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1593 (U.S. 2005).

Jury instruction that all twelve jurors had to agree on verdict before verdict could be returned into court, when read with another instruction which made clear the option jury had in returning to courtroom, properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

When read as a whole, instructions properly informed jury that they could return to courtroom and report that they were unable to agree unanimously on punishment, where court instructed "that all 12 jurors must agree on the verdict before the verdict can be returned into Court," and also made it clear that jury's options were to return verdict of death, return verdict of life imprisonment, or report their inability to agree on a verdict, despite claim that instructions failed to clarify that if, within a reasonable time, jury failed to agree unanimously, it must cease deliberations and report its findings to the court. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Even if jury had never been instructed on what would happen if they could not agree on sentence, there would have been no error. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Defendant was not entitled to diminished capacity instruction in capital murder case, even though doctor testified that defendant's substance abuse problem caused him to suffer "a diminished cerebral activity, cerebral ability" at time of crime; there was no evidence that defendant was substantially impaired in his capacity to appreciate criminality of his conduct and to conform his conduct to requirements of the law. Wiley v. State, 691 So. 2d 959, 1997 Miss. LEXIS 43 (Miss.), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153, 1997 U.S. LEXIS 5706 (U.S. 1997).

Instruction at resentencing phase of capital murder prosecution was not flawed because it failed to require state to prove beyond reasonable doubt and jury to find beyond reasonable doubt that death was appropriate penalty; it was sufficient that it required unanimous finding, beyond reasonable doubt of existence of one or more aggravating circumstances, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and unanimous finding defendant should suffer death. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

It was proper to instruct jurors at penalty phase of capital murder prosecution that they should disregard sympathy in reaching their sentencing decision. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instruction which prohibits, expressly or impliedly, consideration of mitigating circumstances not found unanimously is flawed and requires reversal. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Court was not required to specifically instruct the jury considering death penalty that they did not have to find mitigating circumstances unanimously in order for particular juror to consider them. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury considering death penalty can impliedly be charged with knowledge that unanimous finding of mitigating circumstances is not required where jury has been instructed that no degree of consensus on mitigating circumstances is required. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Courts are encouraged to instruct jurors considering death penalty that, even if all 11 other jurors find that a certain mitigating circumstance does not exist, juror who believes that it does exist must find that mitigating circumstance and weigh it in further deliberations. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Instruction at penalty phase of capital murder prosecution did not provide for unanimous decision for death and unanimous decision for life but, rather, for unanimous decision for death and decision for life; instruction did not require that jury unanimously find for life sentence. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Trial judge's instruction that jurors should return to jury room to clarify ambiguity in jury's findings that supported sentence of death did not taint verdict; jury had death penalty instruction with it, and court directed jury to re-form verdict "if it is the decision of the jury." Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Instruction in death penalty case which included all mitigating factors contained in statute except "age of the defendant" was proper; "age of the defendant" factor

would fall under "catch-all" mitigating circumstance. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Whimsical or residual doubt instructions are not required as a mitigating circumstance in death penalty cases. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

"Catch-all" mitigating factors in capital murder sentencing proceeding encompasses all nonstatutory mitigating circumstances, including defendant's remorse, and, thus, defendant was not entitled to separate mitigating instruction that he had demonstrated extreme remorse for crimes committed. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Method of execution was of no concern to jury and, thus, capital murder defendant was not entitled to sentencing phase instruction informing jurors that defendant would be executed by lethal injection if sentenced to death. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to requested sentencing phase jury instructions on use of mercy, pity or sympathy; trial court has discretion to give mercy instructions. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Capital murder defendant was not entitled to requested sentencing phase instructions directing jury that death sentence should not be selected if any juror has doubt about proper punishment and that jury was not required to sentence him to death; requests were for mercy instructions, which trial court has discretion to give. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Trial court did not violate Eighth Amendment rights of capital murder defendant by refusing to give sentencing phase instruction that court was obligated to consider mitigating factors which in fairness, sympathy and mercy to defendant extenuate or reduce degree of blame or punishment. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Defendant was not entitled to instruction on mitigating circumstance in death penalty phase that she would be 70 years old before she would have been eligible for parole; defendant's age at time she would be eligible for parole, if given life sentence, was speculative. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Instruction that in deciding whether to impose death penalty, jury was "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," was proper. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction at death penalty phase of trial that jury had to consider sympathy and mercy on her behalf; several instructions had directed jury that it was required to consider mitigating circumstances. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant is not entitled to mercy instruction at death penalty phase of trial. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defendant was not entitled to instruction that life sentence rather than death penalty was presumed to be appropriate sentence unless presumption was overcome. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. Colosimo v. Senatobia Motor Inn, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such factors. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A capital murder defendant is not entitled to a "mercy" instruction. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73 the statute under which the defendant pled guilty-defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction affirmatively instructing the jurors that they should individually consider the evidence in mitigation; the instructions given were sufficient where the mitigating circumstances portion of the instruction did not contain "unanimous" or "unanimously," only the aggravating circumstances part of the instruction contained those words, and there was no instruction implying or intimating that a juror should await unanimity before considering a mitigating circumstance. Hansen v. State, 592 So. 2d 114, 1991 Miss. LEXIS 876 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570, 1992 U.S. LEXIS 2882 (U.S. 1992).

In the sentencing phase of capital murder prosecution, an instruction cautioning the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was a proper statement of the law because it did not inform the jury that it was required to disregard in toto sympathy and left the jury the option to vote for or against the death penalty. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, the court properly denied the defendant's requested instruction that the jury "must consider" sympathy and mercy for the defendant, since the instruction was cumulative where another instruction informed the jury that it was required to consider mitigating circumstances if any aggravating circumstances were found to exist. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

In the penalty phase of a capital murder prosecution, a jury instruction stating that the jury "may objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant," was not defective, notwithstanding the defendant's claim that the use of the word "may" allowed the jury to permissively consider mitigating circumstances instead of requiring them to do so, since the instruction did not place limitations on what mitigating circumstances the jury could consider. Shell v. State, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd, in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

In the penalty phase of a capital case, the jury's consideration of whimsical doubt as a mitigating factor was not impaired by the trial court's denial of a jury instruction on whimsical doubt where defense counsel was permitted to argue whimsical doubt to the jury. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In a capital murder prosecution, the jury's note sent to the court after the jury had deliberated for over two hours which stated, "We the jury cannot come to a unanimously [sic] decision-what shall we do?" was simply a request for further instruction, and did not require the dismissal of the jury and imposition of a life sentence. Jones v. Thigpen, 555 F. Supp. 870, 1983 U.S. Dist. LEXIS 19724 (S.D. Miss. 1983), aff'd in part and rev'd in part, 741 F.2d 805, 1984 U.S. App. LEXIS 18556 (5th Cir. Miss. 1984).

In a prosecution for capital murder the trial court properly refused defendant's requested amendment to his jury instruction that "if you are unable to unanimously agree on which circumstances outweigh the other, and arrive at a verdict fixing the punishment, then the form of your verdict should be as follows: we, the jury are unable to unanimously agree on the punishment to be inflicted," where the was no indication in the record that the jury had any difficulty reaching an agreement, and where Code § 99-19-103 imposed a duty on the court to dismiss the jury after a reasonable period of deliberation and impose a life sentence on the defendant. King v. State, 421 So. 2d 1009, 1982 Miss. LEXIS 2256 (Miss. 1982), cert. denied, 461 U.S. 919, 103 S. Ct. 1903, 77 L. Ed. 2d 290, 1983 U.S. LEXIS 4536 (U.S. 1983).

9. —Life, without probation or parole.

In any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty; where a defendant is adjudged to be a habitual offender, the jury should be informed that a life sentence means "life, without probation or parole." Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. Berry v. State, 575 So. 2d 1, 1990 Miss. LEXIS 849 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126, 1991 U.S. LEXIS 2673 (U.S. 1991).

10. —Weighing of aggravating and mitigating circumstances.

In resentencing phase of capital murder prosecution, instruction that jury had to find that mitigating circumstances did not outweigh aggravating circumstances was not improper as shifting burden of proof from state to defendant. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Instruction at resentencing phase of capital murder prosecution was not flawed because it failed to require state to prove beyond reasonable doubt and jury to find beyond reasonable doubt that death was appropriate penalty; it was sufficient that it required unanimous finding, beyond reasonable doubt of existence of one or more aggravating circumstances, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and unanimous finding defendant should suffer death. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Instruction at penalty phase of capital murder prosecution that mitigating circumstances must outweigh aggravating circumstances does not shift state's burden of proving the aggravating circumstances. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

State has no burden to rebut mitigating evidence and, thus, capital murder defendant was not entitled to requested sentencing instruction directing jury that credible evidence of mitigating factors may be considered when weighing mitigating against aggravating circumstances unless state rebuts evidence beyond reasonable doubt. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Instruction that for jury to impose death penalty, it had to find that mitigating circumstances did not outweigh aggravating circumstances, did not improperly allow jury to impose death penalty based solely on presence of aggravating circumstances. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant's argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances must be unanimous because "everything else" required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word "unanimous" or "unanimously," and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital case, a "mercy" instruction stating that a life sentence could be returned regardless of the evidence was not required even though the prosecutor was allowed to elicit promises from the jurors during voir dire that they would return a death sentence if they believed that the aggravating circumstances outweighed the mitigating circumstances. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

Jury instruction in penalty phase of capital murder prosecution which follows language of § 99-19-101 and this section need not define aggravating circumstances which may be found by jury; sentencing instruction does not impermissibly favor sentence of death by instructing jury foreman concerning completion of verdict forms only if death sentence is imposed; jury need not be instructed of authority to return life sentence even where aggravating circumstances outweigh mitigating circumstances. Cabello v. State, 471 So. 2d 332, 1985 Miss. LEXIS 2059 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732, 1986 U.S. LEXIS 1720 (U.S. 1986).

11. —Beyond reasonable doubt.

Instruction at resentencing phase of capital murder prosecution was not flawed because it failed to require state to prove beyond reasonable doubt and jury to find beyond reasonable doubt that death was appropriate penalty; it was sufficient that it required unanimous finding, beyond reasonable doubt of existence of one or more aggravating circumstances, finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and unanimous finding defendant should suffer death. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

The jury is required to find the existence of each aggravating circumstance beyond a reasonable doubt, but it is not required to find that the aggravating circumstances beyond a doubt outweigh the mitigating circumstances. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

In a capital murder prosecution in which defendant was sentenced to death under § 99-19-101 and this section, the trial court did not err in refusing to instruct the jury that they must return a verdict of life imprisonment unless they believed beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. Hill v. State, 432 So. 2d 427, 1983 Miss. LEXIS 2613 (Miss.), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352, 1983 U.S. LEXIS 2329 (U.S. 1983).

12. Habitual offender.

Trial court was required to conduct habitual offender hearing prior to sentencing of defendant for capital murder, in order to make jury aware that, as a habitual offender, defendant could have been sentenced to life imprisonment without possibility of parole. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court's failure to hold habitual offender hearing for defendant convicted of capital murder, which would have allowed jury to sentence defendant to life imprisonment without possibility of parole, required vacatur of death sentence and remand for new sentencing trial with proper instructions. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the trial court erred in denying the defendant's instruction which detailed the effect of his habitual offender indictment. The defendant had a right to have the jury told that his prior convictions and sentences would be considered to enhance the punishment if given a life sentence, and to have the jury informed that this enhancement meant life without parole. Mackbee v. State, 575 So. 2d 16, 1990 Miss. LEXIS 831 (Miss. 1990).

In a capital murder trial, the habitual offender status phase must be conducted prior to the sentencing phase. At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

13. Cruel and unusual punishment.

The Eighth Amendment was not violated by a judge's imposition of the death penalty pursuant to a statute requiring the sentencing judge to consider an advisory jury verdict, where the jury recommended life imprisonment without parole, but the judge concluded that the aggravating circumstance that the murder was committed for pecuniary gain outweighed the mitigating circumstances, since (1) the Eighth Amendment does not require a state to define the weight that a judge must accord an advisory verdict, and (2) the Constitution permits a judge, acting alone, to impose a capital sentence, and thus is not offended when a state further requires a judge to consider a jury's recommendation and trusts the judge to give proper weight to such recommendation. Harris v. Alabama, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004, 1995 U.S. LEXIS 1623 (U.S. 1995).

Application of state death penalty statute to homicide defendant who was 15-years-old at time of offense, following trial as adult which resulted in conviction of first-degree murder, violates cruel and unusual punishment clause of Eighth Amendment, according to plurality of U.S. Supreme Court. Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702, 1988 U.S. LEXIS 3028 (U.S. 1988).

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127, 1987 U.S. LEXIS 1808 (U.S. 1987).

14. Reasonable time for deliberations.

Trial court was within its discretion in denying defendant's motions for a directed verdict because the determination of what was a reasonable time for deliberation was within the trial judge's discretion. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Under the unique circumstances of the case, especially considering the fact that the jury in essence had to go through two separate deliberations in order to follow the sentencing instructions and return separate verdicts for both defendants, the court could not say that the jury did not reach its verdicts within a reasonable time where deliberations required about three hours. Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

15. Sentence by court.

In a capital murder case, a court did not commit error in sending the jury to deliberate further where a document retrieved from the jury room trash can was not submitted by the jury to the trial court as a verdict and was not submitted on post-trial motion to the trial court, where the only reason the court of appeals was aware of it was because the defense attorney had it added to the court papers after the trial. Thus, the only verdict actually given to the court was the one sentencing defendant to death. Scott v. State, 878 So. 2d 933, 2004 Miss. LEXIS 650 (Miss. 2004).

Where the court sentenced the defendant to life after the jury was unable to agree on a sentence, the life sentence was automatically one without parole in light of the amendment to § 47-7-3(1)(f) to provide that no person shall be eligible for parole who is charged, tried, convicted and sentenced to life imprisonment under § 99-19-101. Barnes v. State, 763 So. 2d 216, 2000 Miss. App. LEXIS 306 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR.

Propriety of carrying out death sentences against mentally ill individuals. 111 A.L.R.5th 491.

Validity, Construction, and Application of Pattern and Nonpattern Jury Instructions in State Death Penalty Proceedings. 83 A.L.R.6th 419.

Lawyers' Edition.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances–Supreme Court cases. 111 L. Ed. 2d 947.

Law Reviews.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

§ 99-19-105. Review by State Supreme Court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101;

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and

(d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding

correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death;

(b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, and (i) affirm the sentence of death or (ii) hold the error in the sentence phase harmless error and affirm the sentence of death or (iii) remand the case for a new sentencing hearing; or

(c) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

HISTORY: Laws, 1977, ch. 458, § 4; Laws, 1984, ch. 448, § 7; Laws, 1985, ch. 305, § 1; Laws, 1994 Ex Sess, ch. 23, § 2; Laws, 2000, ch. 569, § 11, eff from and after July 1, 2000.

Editor's Notes — Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.' "

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

Cross References — Criminal docket in supreme court, see § 9-3-21.

Mississippi Capital Defense Litigation Act, see §§ 99-18-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

JUDICIAL DECISIONS

ANALYSIS

I. UNDER CURRENT LAW.

1. In general.
2. Reweighing.
3. Invalid or improper definition of aggravating factor.
4. Harmless error.
5. "Especially heinous, atrocious, or cruel".
6. Limiting instruction.
7. Proportionality.
8. Enmund requisites.
9. Contemporaneous objection.
10. Prosecutor's comments.
11. —Appellate review.
12. Particular cases; death penalty upheld.
13. —Death penalty reversed.
14. "Avoiding or preventing lawful arrest or effecting escape from custody".
15.-20. [Reserved for future use.]

II. UNDER FORMER § 99-19-59.

21. In general.
22. Reasons for delay of execution.

I. UNDER CURRENT LAW.

1. In general.

Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in Baze v Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), and, therefore, a challenge under U.S. Const. amend. VIII to the lethal injection protocol in Mississippi is without merit. Pitchford v. State, 45 So. 3d

216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

A defendant is entitled to appointment of counsel in connection with the automatic review of a death sentence. Jackson v. State, 732 So. 2d 187, 1999 Miss. LEXIS 56 (Miss. 1999).

Provision of post-conviction relief statute requiring that petition for relief be filed within three years after entry of judgment of conviction upon plea of guilty is directed toward guilty pleas that are not attended by direct appeals; cases in which direct appeals have been taken are subject to express language tolling running of time limitation during pendency of such appeals. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) Booker v. State, 699 So. 2d 132, 1997 Miss. LEXIS 375 (Miss. 1997).

In considering kidnapping aggravator in reviewing death sentence for murder, Supreme Court had to decide whether jury heard enough evidence to make determination of kidnapping. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Claim of error in submission of aggravating circumstance that capital offense was committed while defendant was engaged in the commission of sexual battery was waived, despite defendant's claim that it could not be procedurally barred because the Supreme Court has refused to apply the bar to aggravating circumstances and that the Court has a statutory obligation to consider possible sentencing errors not raised by defendant or objected to at trial. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Supreme Court is not under obligation to review all capital murder sentences to determine whether death sentence is appropriate in particular case, but Court must determine whether sentence is excessive or disproportionate to penalty imposed in similar cases. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

In capital cases, although there is no error which, standing alone, requires reversal, aggregate effect of various errors may create such an atmosphere of bias, passion, and prejudice that they effectively deny defendant a fundamentally fair trial. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Jury was not required to find that aggravating circumstances outweighed mitigating circumstances beyond reasonable doubt before imposing death penalty. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Failure to include a jury foreman signature line under the life imprisonment option in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. Colosimo v. Senatobia Motor Inn, 662 So. 2d 552, 1995 Miss. LEXIS 479 (Miss. 1995).

The Federal Constitution's Sixth Amendment guarantee of a criminal defendant's right to a jury trial does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, nor does it require jury sentencing even where the sentence turns on specific findings of fact; capital sentencing proceedings must satisfy the dictates of the due process clause of the Federal Constitution's Fourteenth Amendment. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

In capital murder prosecutions, as in other cases, the Supreme Court has the authority to affirm a conviction for a lesser included offense while simultaneously reversing as to the greater offense, if the evidence so warrants. Wheeler v. State, 536 So. 2d 1341, 1988 Miss. LEXIS 605 (Miss. 1988).

Where the jury's death penalty determination is based upon several aggravating circumstances, the invalidity of one of these circumstances will not constitutionally impair the sentence. Lanier v. State, 533 So. 2d 473, 1988 Miss. LEXIS 523 (Miss. 1988).

A prosecutor's argument in the sentencing phase of a capital case regarding the possibility of the defendant being paroled and the fact that another murder defendant had committed murder after being paroled from a life sentence constituted reversible error. The argument regarding parole introduced an arbitrary factor into the sentencing process proscribed by § 99-19-105(3)(a). Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

A trial court's discretion in passing upon the extent and propriety of questions addressed to prospective jurors is not unlimited and the Supreme Court will take note of abuse on appeal where prejudice to the accused is present. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

In carrying out the duty imposed by this section, the Mississippi Supreme Court must determine whether the death sentence imposed in a particular case is excessive or disproportionate to the penalty imposed in similar cases, and this comparison is made from cases in which the death sentence has been imposed and has been reviewed on appeal by the court. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

While there may be legitimate differences of opinion as to just when and how heightened scrutiny on appeal works in death penalty cases, it would seem clear that heightened scrutiny approach is most needed and most applicable in cases resting upon circumstantial evidence and where matter of whether defendant is guilty at all is by no means free of all doubt. Fisher v. State, 481 So. 2d 203, 1985 Miss. LEXIS 2281 (Miss. 1985).

In conducting required proportionality review of death penalty, Mississippi Supreme Court is not required to conduct detailed examination and review of all capital murder cases. Gray v. State, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

2. Reweighing.

Post-conviction relief was denied in a capital murder case on the issue of whether a circuit court erred by using the aggravating circumstance of "especially heinous, atrocious, or cruel" based on a sufficiency of the evidence; however, even if it was not barred, the issue was without merit since the victim was beaten, strangled, raped, stabbed, and left to die as her home was set on fire. Howard v. State, 945 So. 2d 326, 2006 Miss. LEXIS 531 (Miss. 2006), cert. denied, 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278 (U.S. 2007).

Statute giving Supreme Court power to reweigh aggravating and mitigating factors or conduct harmless error review of imposition of death penalty has no application to sentences imposed prior to its passage; right to jury determination of penalty of death is substantial substantive right, deeply rooted in law, which should not be annulled by retroactive application of statute as amended. (Per Banks, J., with three Justices concurring and one Justice concurring in result only.) Booker v. State, 699 So. 2d 132, 1997 Miss. LEXIS 375 (Miss. 1997).

It is not violation of due process to have appellate court perform reweighing or harmless error analysis when invalid aggravating circumstance is found to exist in capital case. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Supreme Court reviewing denial of post-conviction relief in capital murder case lacked authority under state law to reweigh aggravating and mitigating circumstances in order to uphold death sentence after finding that improperly defined aggravating circumstance had been submitted to jury, and also lacked authority to engage in harmless error analysis, where case was tried and affirmed on direct appeal before passage of statute granting such authority. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

Retroactive application of statute granting Supreme Court authority in its review of death penalty cases to reweigh aggravating and mitigating circumstances and to conduct harmless error analysis is violation of state constitutional provisions against ex post facto law. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

The State Supreme Court was required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

Only the jury, by unanimous decision, can impose the death penalty; as to aggravating circumstances, the Mississippi Supreme Court only has the authority to determine whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; there is no authority for the Supreme Court to reweigh remaining aggravating circumstances when it finds one or more to be invalid or improperly defined, nor is there authority for the Supreme Court to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing; finding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury. (Overruling Johnson v. State (Miss. 1989) 547 So. 2d 59 to the extent that it implies the Mississippi Supreme Court's authority under state law to reweigh in the face of an invalid or improperly defined aggravating circumstance in order to uphold a death sentence.) Johnson v. State, 547 So. 2d 59, 1989 Miss. LEXIS 356 (Miss. 1989), overruled, Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992), but see Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

The Federal Constitution does not prevent a state appellate court from upholding a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence-although such a conclusion does not mean that state appellate courts are required to, or necessarily should, engage in such reweighing-as (1) a defendant's Sixth Amendment right to a jury trial is not infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury but affirms the death sentence after itself finding that the one or more valid aggravating factors outweigh the mitigating evidence; (2) the defendant does not have an unqualified liberty interest, under the due process clause of the Fourteenth Amendment, to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed, where (a) the state court has asserted its authority under state law to decide this question for itself rather than considering itself bound to vacate the sentence and remand for new sentencing proceedings before a jury, and (b) the United States Supreme Court has no basis for disputing the state court's interpretation of state law; and (3) nothing inherent in the process of appellate reweighing is inconsistent with the pursuit of the Eighth Amendment's objectives, in capital sentencing proceedings, of measured consistent application and fairness to the accused, since (a) state appellate courts-which must routinely consider, in "weighing" states, whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed, and must engage in a similar process of weighing aggravating and mitigating evidence in conducting proportionality review-can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances and background and on the crime, (b) there is nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence, and (c) an appellate court is able to evaluate adequately any evidence relating to mitigating factors without the assistance of written jury findings. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance-which was found to be unconstitutionally vague-or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

In a state where capital sentencing procedures require the sentencing jury to weigh aggravating circumstances and mitigating factors in order to determine the propriety of a death sentence, an automatic rule by which an appellate court would affirm a death sentence-even though that sentence was based in part on an aggravating circumstance that is found to be invalid-so long as there remained at least one valid aggravating circumstance, would itself be invalid under the Federal Constitution, for such a rule would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

3. Invalid or improper definition of aggravating factor.

Because there was a credible concern about the validity of a prior armed conviction used as an aggravating factor, the Supreme Court had before it an adequate record of that prior conviction, and the Supreme Court was required by statute to ensure the validity of the death sentence, the Supreme Court indicated it would undertake a review of defendant's prior armed robbery that would go beyond the mere face of the conviction. Hollie v. State, 174 So. 3d 824, 2015 Miss. LEXIS 488 (Miss. 2015), overruled in part, Pitchford v. State, 240 So. 3d 1061, 2017 Miss. LEXIS 420 (Miss. 2017).

The new rule announced in Willie v. State (Miss. 1991) 585 So. 2d 660 – that a jury may not "doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators" when determining the sentence to be imposed in a capital murder case – is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A capital murder defendant's motion for a new sentencing hearing would be granted where the defendant sought relief based on the use of an unconstitutionally vague sentencing instruction defining the "especially heinous" aggravating circumstance. Davis v. State, 655 So. 2d 864, 1995 Miss. LEXIS 218 (Miss. 1995).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or conduct a traditional harmless error analysis. Stringer v. State, 638 So. 2d 1285, 1994 Miss. LEXIS 333 (Miss. 1994).

A capital murder defendant's sentence of death would be vacated and remanded for a new sentencing hearing where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. Woodward v. State, 635 So. 2d 805, 1993 Miss. LEXIS 442 (Miss. 1993).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion for a new sentencing hearing would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, since the Supreme Court would not reweigh aggravating and mitigating circumstances or perform a harmless error analysis. Wiley v. State, 635 So. 2d 802, 1993 Miss. LEXIS 439 (Miss. 1993).

The Supreme Court has no authority to uphold a death sentence in the light of an invalid or improperly defined aggravating circumstance by reweighing remaining aggravating circumstances; neither does the Supreme Court have the authority to find evidence to support a proper definition of an aggravating circumstance in order to uphold a death sentence by reweighing. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

The State Supreme Court was required to remand a case, which was brought under the Uniform Post-Conviction Collateral Relief Act, to another sentencing jury after the United States Supreme Court held that a conviction which had been vacated and dismissed had not been a proper aggravating circumstance for consideration by the trial jury and reversed and remanded the judgment of conviction. The State Supreme Court had no authority to make the decision itself as to whether to reimpose the death penalty or reduce the defendant's sentence to life imprisonment because of the invalidation of the aggravating circumstance which was considered by the original trial jury. Clemons v. State, 593 So. 2d 1004, 1992 Miss. LEXIS 7 (Miss. 1992).

Although a state appellate court may properly uphold a jury-imposed death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance and rendered without written jury findings as to specific mitigating circumstances, by reweighing the aggravating and mitigating evidence, the United States Supreme Court will vacate a state appellate court's judgment upholding a death sentence, and remand for further proceedings, insofar as the judgment purported to rely on such a reweighing, where (1) the opinion of the state appellate court is unclear with respect to whether that court (a) performed a weighing function, either by entirely disregarding the invalid aggravating circumstance-which was found to be unconstitutionally vague-or by including that factor in the balance as narrowed by the state court's prior decisions, or instead (b) improperly applied an automatic rule authorizing or requiring affirmance of a death sentence so long as there remained at least one valid aggravating circumstance; and (2) the opinion of the state appellate court is virtually silent with respect to the particulars of the alleged mitigating evidence presented by the defendant to the jury, so that the Supreme Court cannot be sure that the state appellate court fully heeded the Supreme Court's cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that Maynard v. Cartwright (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and Clemons v. Mississippi (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). Smith v. State, 648 So. 2d 63, 1994 Miss. LEXIS 666 (Miss. 1994).

4. Harmless error.

Defendant's death-penalty conviction after he was convicted of murder, rape, and four counts of sexual battery was appropriate because a rational trier of fact could have found beyond a reasonable doubt that defendant killed the victim in order to avoid apprehension and arrest; assuming arguendo that the issue did have merit, utilizing the reweighing mandated by Miss. Code Ann. § 99-19-105(3)(d) and (5)(b), the supreme court would have held the error harmless and affirmed the death sentence because defendant presented no mitigating evidence. Loden v. State, 971 So. 2d 548, 2007 Miss. LEXIS 558 (Miss. 2007), cert. denied, 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568 (U.S. 2008).

A sentence of death was not improperly based on "vengeance and sympathy," in spite of the defendant's argument that the jury's sentencing determination was improperly predicated on the personal characteristics of the victim, where in response to the defendant's parents' request to the jury not to sentence their son to death the prosecutor merely noted that the defendant's parents were not the only ones who had suffered and grieved and that their "tears might be outweighed by the fact of the victim's murder," and he reminded the jury that the victim's parents had also suffered a loss and that they must not forget the "cold, calculated killing" of the victim. Foster v. State, 639 So. 2d 1263, 1994 Miss. LEXIS 670 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221, 1995 U.S. LEXIS 2061 (U.S. 1995).

Although criminal defendants in Mississippi generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101, which requires that the jury perform the weighing of aggravating and mitigating factors, Article 3, §§ 14 and 26 of the Mississippi Constitution operate together to elevate the statutory right to one of constitutional significance which the Supreme Court of Mississippi cannot abridge by applying harmless error analysis, whether by disregarding entirely the invalid circumstance or by applying a limiting construction; thus, a murder defendant's motion for leave to file a post-conviction petition would be granted where the defendant sought relief based on the jury's reliance on an invalid aggravating circumstance, and the case would be remanded to the circuit court for new sentencing hearings. Wilcher v. State, 635 So. 2d 789, 1993 Miss. LEXIS 447 (Miss. 1993).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992).

In determining whether a death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance, may be upheld on appeal on the basis of a determination that the error which occurred during the sentencing procedure was harmless, the proper standard of proof is whether the error has been shown to have been harmless beyond a reasonable doubt. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

The Federal Constitution does not prevent a state appellate court from upholding a death sentence, which was based in part upon an invalid or improperly defined aggravating circumstance, by determining that the error which occurred during the sentencing procedure was harmless; such a conclusion does not mean, however, that state appellate courts are required to, or necessarily should, engage in harmless-error analysis in such instances. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725, 1990 U.S. LEXIS 1667 (U.S. 1990).

5. "Especially heinous, atrocious, or cruel".

Even if it was error for an officer to testify as an expert witness as to blood spatters showing that the victim was murdered execution-style, evidence that defendant abducted the victim from her home in broad daylight, forcing her to leave her three-year-old son sleeping alone in the house; forced her to drive to a wooded area on the pretext that he was going to deliver her to his partner while he retrieved ransom money from her husband; upon arriving at the wooded area the victim, undoubtedly, realized that there was no partner waiting for defendant; defendant shot the victim in the back of the head and then drove back into town and continued with his plan to extort money from the victim's husband, where for two days he led the husband to believe that his wife was alive and well was still sufficient to support the especially heinous aggravator. Jordan v. State, 912 So. 2d 800, 2005 Miss. LEXIS 170 (Miss. 2005).

Imposition of the death sentence upon a minor was not excessive or disproportionate where the murder of an elderly woman was found to be especially heinous, atrocious, and cruel. Dycus v. State, 875 So. 2d 140, 2004 Miss. LEXIS 366 (Miss. 2004), vacated, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212 (U.S. 2005).

Death sentence for a capital murder was proportionate because the evidence supported the trial court's finding that the statutory aggravating factors of engaging in the commission of or attempting to commit the crime of rape and committing a heinous, atrocious or cruel crime in the execution of the victim were proven beyond a reasonable doubt. Powers v. State, 883 So. 2d 20, 2003 Miss. LEXIS 850 (Miss. 2003), cert. denied, 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1584 (U.S. 2005).

Evidence was sufficient to show that the murder of the two victims was especially heinous, atrocious, or cruel where (1) both victims sustained severe beatings about the head and face before having their throats viciously slashed to the backbone, (2) the blows to the women's heads were brutal enough to cause bleeding under the scalp and inside the skull, (3) one victim endured multiple bruises to the brain, and the other suffered bleeding within the brain, (4) a physician testified that the throat slashings would have occurred 10 minutes or more after the head beatings, and (5) one victim additionally sustained defensive posturing blows to her left arm and injuries to her torso consistent with being stomped, resulting in fractured ribs, bruised lungs, abdominal bleeding, and bruising and tearing in her liver and spleen. Manning v. State, 735 So. 2d 323, 1999 Miss. LEXIS 130 (Miss. 1999).

The jury properly found the murder to be especially heinous, atrocious, or cruel where (1) the defendant kidnapped the victim from her own home, (2) he made her walk to her impending doom on nerve damaged feet, all the while leaving her to ponder how, when, why and in what manner she would be executed, (3) when the two arrived at the defendant's chosen execution site, he ordered the victim to kneel before him, (4) he then stood a couple of feet away, and savagely fired four shots into her fragile body, (5) the first bullet tore through her right lung, diaphragm and liver, (6) the second ripped though her bloody back only to further tear apart her damaged right lung, (7) the next bullet took a brutal path through her left ear, neck and shoulder, and (8) the final bullet ripped through the victim's left arm. Underwood v. State, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Jury was not entitled to consider aggravating factor in death penalty case that murder committed by defendant was especially heinous, atrocious, or cruel; no evidence was presented to jury as to how crime was actually committed, and even if cause of death was strangulation, as pathologist speculated, there was no evidence how strangulation was carried out and no evidence of any additional acts to set crime apart from norm of capital felonies as conscienceless, pitiless, or unnecessarily torturous. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Aggravating circumstance in death penalty case that murder was especially heinous, atrocious, or cruel may be used only when jury is instructed as to its meaning in manner which will channel jury's discretion. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Submission to jury of "especially heinous, atrocious or cruel" aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. Cole v. State, 666 So. 2d 767, 1995 Miss. LEXIS 595 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

A sentencing instruction in a capital murder prosecution properly defined the "especially heinous, atrocious, or cruel" aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term "heinous, atrocious, or cruel" as "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily tortuous to the victim." Hansen v. State, 649 So. 2d 1256, 1994 Miss. LEXIS 496 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422, 1995 U.S. LEXIS 7828 (U.S. 1995).

In the sentencing phase of a capital murder prosecution, the definition of the "especially heinous, atrocious, or cruel" aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim" and which can be shown by the fact that the defendant "utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim." Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

6. Limiting instruction.

Jury instruction during sentencing phase of capital murder prosecution, defining especially heinous, atrocious or cruel offense, adequately limited jury's consideration, despite contention that instruction was unconstitutionally overbroad and vague in that it established a multiple choice questionnaire for jurors to contend with. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. Jones v. State, 602 So. 2d 1170, 1992 Miss. LEXIS 345 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177, 1992 Miss. LEXIS 384 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in Coleman v. State (Miss. 1979) 378 so2d 640. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

7. Proportionality.

In a case in which defendant was convicted of the capital murder of an elderly woman, defendant's death sentence was neither excessive nor disproportionate. The Supreme Court could not conclude that the jury sentenced defendant to death out of passion, prejudice, or some other arbitrary factor. Hutto v. State, 227 So. 3d 963, 2017 Miss. LEXIS 180 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 983, 200 L. Ed. 2d 262, 2018 U.S. LEXIS 1361 (U.S. 2018).

Defendant's punishment of death was not too great when the aggravating and mitigating circumstances were weighed against each other, and the death penalty would not wantonly or freakishly be imposed because the punishment was commensurate with punishments imposed in a litany of similar cases. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

In reviewing defendant's death sentence pursuant to this section, in light of similar capital-murder cases in which robbery was the underlying felony a sentence of death was not disproportionate. Keller v. State, 138 So. 3d 817, 2014 Miss. LEXIS 89 (Miss. 2014), cert. denied, 574 U.S. 1159, 135 S. Ct. 1397, 191 L. Ed. 2d 371, 2015 U.S. LEXIS 1353 (U.S. 2015).

Defendant's sentence of death by lethal injection for the crime of capital murder with the underlying felony of robbery was not excessive or disproportionate to the penalty imposed in similar cases and was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Defendant's death by lethal injection sentence was neither excessive nor disproportionate where there was sufficient evidence to support the jury's finding of the statutory aggravating circumstance enumerated by Miss. Code Ann. § 99-19-101(5)(d), and the record did not establish that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Pitchford v. State, 45 So. 3d 216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

Court rejected defendant's argument that the death penalty was excessive and disproportionate in light of the gravity of his mental disabilities because the record revealed that defendant had a full scale IQ score of 104, which placed him in the average to slightly above average range, and because defendant refused to allow the evaluating mental health professional access to his past psychiatric records and refused to effectively participate in the doctor's evaluation, thus making the doctor's diagnosis less than reliable. Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009), cert. denied, 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251 (U.S. 2010).

In a proportionality review under Miss. Code Ann. § 99-19-105(3), defendant's death sentences for her two capital murder convictions were not excessive or disproportionate because (1) they were not imposed under the influence of passion or prejudice; (2) the evidence supported the jury's finding of statutory aggravating circumstances that the capital offenses were committed while defendant was engaged in or was an accomplice in the commission of or an attempt of flight after committing a robbery, that they were committed for the purpose of avoiding or preventing a lawful arrest, and that they were especially heinous, atrocious, or cruel under Miss. Code Ann. § 99-19-101(5)(d), (e), and (h); and (3) in comparing other cases to defendant's case, the death sentence had been imposed in factually similar cases. Chamberlin v. State, 989 So. 2d 320, 2008 Miss. LEXIS 352 (Miss. 2008), cert. denied, 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495 (U.S. 2009).

Because the inmate failed to allege any specific errors resulting from the fact that the court lacked a transcript of voir dire, his argument was without merit. Brawner v. State, 947 So. 2d 254, 2006 Miss. LEXIS 625 (Miss. 2006).

In defendant's capital murder case, there was no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice or other arbitrary factor. The evidence supported the trial court's finding that the statutory aggravating factor of robbery was proven beyond a reasonable doubt, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate. Spicer v. State, 921 So. 2d 292, 2006 Miss. LEXIS 20 (Miss.), cert. denied, 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022 (U.S. 2006).

Death sentence was not imposed under the influence of passion, prejudice, or any other factor where the evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances. In comparison to other factually similar cases where the death sentence was imposed, the sentence of death was neither excessive or disproportionate in defendant's case; in addition, the jury did not consider any invalid aggravating circumstances. Scott v. State, 878 So. 2d 933, 2004 Miss. LEXIS 650 (Miss. 2004).

A death sentence for an aider and abettor who provided a gun that was used in a murder was not excessive or disproportionate under Miss. Code Ann. § 99-19-105(3)(c) and state and federal constitutional law because, when the jury returned the death sentence, it specifically found that defendant had intended to kill the victim and contemplated that lethal force would be used. Lynch v. State, 877 So. 2d 1254, 2004 Miss. LEXIS 591 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592 (U.S. 2005).

In a capital murder case, defendant's sentence of death was proportionate to the crime, as the victim was beaten, strangled, bitten three times, raped, stabbed twice, and left to die in her house, which was then set on fire. Howard v. State, 853 So. 2d 781, 2003 Miss. LEXIS 343 (Miss. 2003), cert. denied, 540 U.S.

1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113, 2004 U.S. LEXIS 1327 (U.S. 2004).

The imposition of the death penalty was not disproportionate where the defendant was convicted of murdering two elderly women by means of beating them unconscious with an iron and slashing their throats with a kitchen knife, while robbing them of approximately $12. Manning v. State, 765 So. 2d 516, 2000 Miss. LEXIS 161 (Miss. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142, 2001 U.S. LEXIS 2042 (U.S. 2001).

A sentence of death was not disproportionate where the defendant was convicted of two counts of murder in the commission of a felony arising from two separate armed robberies. Turner v. State, 732 So. 2d 937, 1999 Miss. LEXIS 61 (Miss.), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319, 1999 U.S. LEXIS 7156 (U.S. 1999).

The imposition of the death penalty was not found disproportionate where the record revealed (1) that the defendant was more than likely the instigator of the robbery that led to the victim's death, as well as the one who planned it, (2) that both defendants were armed on the day of the robbery and that the defendant knew that the codefendant had a gun, (3) the co-defendant, who was the triggerman, was also sentenced to death, (4) there was no evidence that the defendant suffered from any mental illness or retardation, and (5) the defendant had at least three prior convictions for felonies involving violence, including kidnapping and aggravated assault. Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

The imposition of a sentence of death was not excessive or disproportionate, notwithstanding expert testimony that the defendant could be easily dominated, since nothing in the record indicated significant mental problems affecting the defendant. Jordan v. State, 728 So. 2d 1088, 1998 Miss. LEXIS 566 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778, 1999 U.S. LEXIS 4276 (U.S. 1999).

The death sentence was not disproportionate in a murder prosecution arising from the robbery of a store by the defendant and his brother where there was no evidence to support the defendant's contention that he was under the substantial domination of his older brother and the evidence showed that the defendant was, more than likely, the triggerman. Smith v. State, 724 So. 2d 280, 1998 Miss. LEXIS 589 (Miss. 1998).

Sentence of death was neither excessive nor disproportionate for defendant convicted of robbing and brutally murdering two women by stabbing them a total of 46 times. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Supreme Court's determination whether death sentence is excessive or disproportionate to penalty imposed in similar cases is made by comparison of cases in which death sentence was imposed and was reviewed on appeal by the Court and, in making individualized comparison, Court considers the crime and the defendant. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Sentence of death imposed on defendant convicted of murder during robbery in which he stabbed victim 31 times was not disproportionate. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

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Imposition of death sentence for ambush shooting of small convenience store operator as he left premises was not disproportionate to penalty imposed in similar cases, considering the crime and defendant. Wiley v. State, 691 So. 2d 959, 1997

Miss. LEXIS 43 (Miss.), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153, 1997 U.S. LEXIS 5706 (U.S. 1997).

Death penalty for capital murder was not disproportionate in case in which defendant mutilated victim's body by excising her vagina and anus while she was still alive and joked about it later. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Death penalty for capital murder committed in course of robbery was not disproportionate punishment, notwithstanding that defendant was under influence of cocaine at time offense was committed, that he had no prior felony convictions, and that he cooperated with police. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Sentence of death imposed upon 17-year-old defendant with IQ of 67 who struck victim with baseball bat, inserted it into her anus, and had sex with her after she was dead was not disproportionate. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517, 1996 U.S. LEXIS 7523 (U.S. 1996).

Death sentence was not excessive or disproportionate for defendant convicted of fatal stabbing of 4 children and inflicting life-threatening wounds upon an adult and another child while in search of money kept in residence. Jackson v. State, 672 So. 2d 468, 1996 Miss. LEXIS 718 (Miss. 1996).

Imposition of death penalty on defendant who killed victim during course of robbery was not disproportionate to penalty imposed in similar cases, although defendant was 17 years old at time of offense, had disadvantaged background and had low IQ. Holly v. State, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss.), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Proportionality requirement was satisfied in capital murder case involving kidnapping of stranger, sexual assault prior to killing, and efforts to hide body and obscure evidence; death penalty had been given, and found to be proportional, in another case involving same elements. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Imposition of death penalty, on defendant convicted for kidnapping, sexually assaulting and killing victim, was not disproportionate even though accomplice who provided evidence against defendant received sentence of life imprisonment; it was defendant's idea to take victim to deserted location, and defendant had been actual perpetrator of assaults, other than one rape perpetrated by accomplice. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Sentence of death, imposed on defendant convicted of killing prison guard, was not excessive or disproportionate to other similar cases in which death sentence had been imposed. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Death penalty was not disproportionate sentence for felony murder, where defendant instigated and planned robbery of victim, she had several opportunities to back out of robbery, she provided guns to accomplices to use against victim, and she burned victim's house to cover her guilt. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A death sentence for a conviction of murder was disproportionate to the penalty imposed in similar capital cases, considering both the crime and the defendant, where the defendant was 18 years old at the time of the crime, he suffered some mental illness and mental retardation, the murder was committed by another person, and the defendant did nothing physically to assist the other person in the assault. Reddix v. State, 547 So. 2d 792, 1989 Miss. LEXIS 359 (Miss. 1989).

8. Enmund requisites.

State has right and requirement, in death penalty resentencing cases, to put on evidence impacting Enmund factors, relating to circumstances surrounding victim's death. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

State, in its case in chief during penalty phase of capital murder case, is permitted to introduce evidence relevant to one or more of 8 statutory aggravating circumstances along with evidence from guilt phase relevant to Enmund factors, regarding circumstances surrounding victim's death. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Evidence of detailed circumstances of underlying murder was admissible at resentencing in capital murder case to support Enmund factors, concerning whether defendant actually killed, attempted to kill, intended that killing take place and contemplated that lethal force would be employed. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

Finding that capital murder defendant either killed, attempted to kill, intended that killing take place, or used lethal force, as required for imposition of death penalty, need not be made by jury, but may be made by state appellate court, trial judge or jury. Cabana v. Bullock, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704, 1986 U.S. LEXIS 46 (U.S. 1986), overruled in part, Pope v. Illinois, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439, 1987 U.S. LEXIS 1934 (U.S. 1987).

On remand of a capital murder case from the United States Supreme Court for a determination as to whether the death penalty requirements set forth in Enmund v. Florida (1982) 73 L. Ed. 2d 1140, 102 S. Ct. 3368 were met, the Mississippi Supreme Court could determine from the trial record whether the Enmund requisites were met, and was not required to remand the case to the lower court for an evidentiary hearing. If the state Supreme Court determined that the record supported the finding of at least one of the Enmund requisites, then the procedure would be to reimpose the death penalty and set an execution date for the defendant. If the court was unable to determine that at least one of the Enmund requisites was reflected by the record, then the case would be remanded to the lower court for an evidentiary hearing to make that determination. Bullock v. State, 525 So. 2d 764, 1987 Miss. LEXIS 2763 (Miss. 1987).

9. Contemporaneous objection.

Objections to instruction on aggravating factor in resentencing phase of capital murder case were procedurally barred when raised for the first time on appeal; applicability of contemporaneous objection rule with respect to federal claims was not diminished in capital cases. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Claims of prosecutorial misconduct were waived absent contemporaneous objection, even though case was death penalty case, where none of the incidents complained about involved fundamental right and none were so egregious and inflammatory that trial court should have taken corrective action on its own motion. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

In the sentencing phase of a capital case, the defense counsel's single objection which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

The rule that any error is waived if no contemporaneous objection is made is equally applicable in a capital case. Cole v. State, 525 So. 2d 365, 1987 Miss. LEXIS 2655 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348, 1988 U.S. LEXIS 4775 (U.S. 1988).

10. Prosecutor's comments.

Although trial judge properly sustained defendant's objection to language in prosecutor's closing argument that imposition of death penalty would send a message, such language did not require reversal in capital murder trial. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Trial court did not erroneously allow prosecutor to comment on heinous, atrocious, and cruel aggravator in closing argument in sentencing phase of capital murder trial; record reflected that district attorney was merely restating testimony of doctor who performed autopsy which was a proper comment on the evidence. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

In view of fact that defense chose to use imagery in closing argument at sentencing trial to compare defendant to a rabbit, an image that hardly fit person who had already been found guilty of brutally stabbing victim 31 times, state's response using "mad dog" imagery was within latitude granted to counsel during closing arguments. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Attorneys are to be given wide latitude in making their closing arguments and, given latitude afforded attorneys during closing argument, any allegedly improper prosecutorial comments must be considered in context, considering circumstances of case, when deciding on their propriety. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Prosecutor's "who is the state" argument that "we, the government, are the victims of this crime, the sons, the daughters, the husband, the brothers, the sisters, the grandchildren" did not introduce element of passion, prejudice, or any other arbitrary factor into sentencing hearing, especially where there was no evidence that members of victims' families were present inside the rail at trial. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Prosecutor's "send a message" language in closing argument at sentencing trial did not require reversal, but prosecutors are cautioned against its use. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

In view of fact that defense chose to use imagery in closing argument at sentencing trial to compare defendant to a rabbit, an image that hardly fit person who had already been found guilty of brutally stabbing victim 31 times, state's response using "mad dog" imagery was within latitude granted to counsel during closing arguments. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Claims of prosecutorial misconduct were waived absent contemporaneous objection, even though case was death penalty case, where none of the incidents complained about involved fundamental right and none were so egregious and inflammatory that trial court should have taken corrective action on its own motion. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Comment by prosecutor in resentencing phase of capital murder trial, in response to defense argument that defendant acting alone could not have killed victim in manner described, that defendant could have done it if victim was drunk or had taken drugs, or if defendant had given her drugs, though not recommended, was not so inflammatory as to necessitate trial court's objecting on its own motion or to require finding of error on appeal as arguing facts not in evidence, in case in which the defense first suggested that someone may have put drugs in victim's drink, in attempt to show that she was in altered state and not completely innocent. Williams v. State, 684 So. 2d 1179, 1996 Miss. LEXIS 194 (Miss. 1996), cert. denied, 520 U.S. 1145, 117 S. Ct. 1317, 137 L. Ed. 2d 479, 1997 U.S. LEXIS 1983 (U.S. 1997).

Capital murder defendant was not prejudiced by prosecutor's statement that the only "correct choice" upon conviction was death penalty; trial court instructed that jury must decide whether defendant should be sentenced to death or to life imprisonment, leaving no question that jurors were fully informed of their options, and jurors were presumed to follow law as instructed. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor did not make improper statement of law, in closing argument of penalty phase in capital murder case, that matters in mitigation carry less weight than matters of aggravation; remarks were supported by law which holds that aggravating factors must be found beyond reasonable doubt, while mitigating factors may simply be found. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor in capital murder case did not utilize absence of mercy instruction to improperly argue that jurors could not consider mercy or sympathy in their deliberations; prosecutor was allowed to argue that defendant was not deserving of sympathy and jurors had been informed by court that statements of counsel were not evidence, and that they must follow court's instructions and consider evidence presented. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor did not impermissibly suggest that it was state Supreme Court, rather than jury, that had responsibility of imposing death sentence, when prosecution commented that death penalty had "been through the courts" and had been "honed and sharpened and brought into keen focus." Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Prosecutor's comparison of defendant to Charles Manson at death penalty phase was not so improper as to require reversal; prosecutor did not call defendant names, did not vilify her, did not try to enrage jury, and did not go into details of Manson's crimes. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Prosecutor's comment at death penalty phase of trial that defendant had "turn[ed] to a life of crime" was not so improper as to require reversal; evidence in record indicated that defendant was serving sentence for armed robbery, and defendant had just been found guilty of capital murder. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Exception to general rule that state may not mention possibility of appellate review exists where statement is made in response to statement of defense counsel. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Defense counsel's comments that Charles Manson murders were more gruesome than that committed by defendant, yet Manson had not received death penalty, opened door for prosecution to mention appellate review by stating that death penalty had been imposed in Manson case but that death penalty statute had later been held unconstitutional. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

In the penalty phase of a capital murder prosecution, the prosecutor's comment that "we have never heard one single witness say he ever felt sorry for what he did" was not impermissible, as it was simply an argument that none of the defendant's mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for "lack of remorse" as an aggravating factor. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A prosecutor's remarks during the penalty phase of a capital murder prosecution did not constitute an improper comment on the defendant's failure to testify where the prosecutor stated that the defendant "showed no compassion, but would send a lawyer up here and ask you for compassion," since the argument pointed out the lack of a mitigation defense presented by the defendant, and that he was reduced to sending his lawyer in to plead for his life after all else had failed. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital case, the defense counsel's single objection which was directed at the prosecutor's argument regarding the possibility of parole but did not specifically address the prosecutor's mention of appellate review, properly preserved both errors where the argument regarding appellate review and the possibility of parole were interwoven. The Eighth Amendment required that the Supreme Court consider the prosecutor's argument concerning appellate review on the merits. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

11. —Appellate review.

If one sentencing aggravator is found to be invalid, under Miss. Code Ann. § 99-19-105(5)(b), the Supreme Court of Mississippi is authorized to reweigh the remaining aggravators against the mitigating circumstances and affirm, hold the error to be harmless, or remand for a new sentencing hearing. Davis v. State, 897 So. 2d 960, 2004 Miss. LEXIS 803 (Miss. 2004).

No evidence supported a finding that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and thus, imposition of death sentence on defendant for killing a 78-year old woman by stabbing her during a burglary was not improper. Grayson v. State, 806 So. 2d 241, 2001 Miss. LEXIS 303 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329, 2002 U.S. LEXIS 7800 (U.S. 2002).

A prosecutor's mention of appellate review during the sentencing phase of a capital case might well have lessened the jurors' sense of responsibility and therefore constituted reversible error. Furthermore, the prosecutor's insinuation that capital murderers monopolize judicial resources and are coddled by appellate courts may have introduced an arbitrary factor proscribed by this section. Williams v. State, 544 So. 2d 782, 1987 Miss. LEXIS 2843 (Miss. 1987).

When prosecutor seeks to rebut defense counsel's effort to impress upon sentencing jury enormity of decision to impose death penalty by informing jury that decision will be subject to automatic appellate review, sentence of death imposed by jury must be vacated. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231, 1985 U.S. LEXIS 96 (U.S. 1985).

In view of the severely limited power of appellate courts to review death sentences pursuant to subsections (3)(a), (b), and (c) of this section, a prosecutor may not argue to the jury regarding appellate review or any other matter which might reasonably be expected to cause a juror to consider that he or she shares with anyone other than his or her 11 fellow jurors the responsibility of determining whether a defendant will be sentenced to death, and such argument constitutes reversible error. Williams v. State, 445 So. 2d 798, 1984 Miss. LEXIS 1578 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795, 1985 U.S. LEXIS 471 (U.S. 1985).

12. Particular cases; death penalty upheld.

Defendant's act of carjacking per se involved conduct that presented a serious potential risk of physical violence to another, and therefore any conviction for carjacking constituted a felony involving the use or threat of violence to the person for purposes of aggravating circumstances in a death penalty case. Galloway v. State, 122 So. 3d 614, 2013 Miss. LEXIS 328 (Miss. 2013), cert. denied, 572 U.S. 1134, 134 S. Ct. 2661, 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685 (U.S. 2014).

Evidence legally or factually supported the jury's finding of each of the statutory aggravating circumstances of (1) the capital murder was committed during the commission of the crime of robbery; (2) the capital murder was committed for the purpose of avoiding arrest; and (3) the capital murder was especially heinous,

atrocious, or cruel. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Defendant's sentence of death after being convicted for capital murder during the commission of a robbery was proper under Miss. Code Ann. 99-19-105(3)(c) because the death penalty had been upheld in cases involving capital murders committed during the commission of a robbery and the Supreme Court of Mississippi had recently upheld the death penalty of another defendant for committing the same crimes for which the current defendant was convicted. Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), nothing in the record supported a finding that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The findings by the trial judge were supported by the record, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in the present case. Wilson v. State, 21 So. 3d 572, 2009 Miss. LEXIS 450 (Miss. 2009), cert. denied, 560 U.S. 909, 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966 (U.S. 2010).

In defendant's trial on a charge of capital murder, the court rejected defendant's claim that the prosecution failed to produce evidence sufficient to convict him of the underlying felony of robbery because defendant's possession of the deceased victim's wallet created a reasonable inference that the property was stolen; the State's theory of the case was that defendant went back to the motel where he and the victim had been staying to get back what was rightfully his-the money in the victim's wallet, and the evidence, although circumstantial, supported this theory. During the State's case-in-chief, evidence was presented to establish that, after defendant left the motel earlier in the day, the victim feared his return, and when defendant did return and was unable to access the room, a motel employee told him that the door was locked from the inside; additional evidence was presented that defendant had received a significant amount of money from his mother for a business that he planned to start and that defendant was supporting the victim and was the source of the cash found inside her wallet. Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009), cert. denied, 559 U.S. 944, 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251 (U.S. 2010).

After reviewing the record in defendant's appeal as well as similar death penalty cases, the supreme court determined that defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; also, the evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances. King v. State, 960 So. 2d 413, 2007 Miss. LEXIS 317 (Miss. 2007), cert. denied, 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244 (U.S. 2008).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq. was appropriate in part because the supreme court's review of the proportionality of the death sentence on direct appeal was not inadequate, Miss. Code Ann. § 99-19-105(3); first, the issue was procedurally barred because it had already been decided; and second, the supreme court once again found that the sentence imposed was not disproportionate because, in his course of robbing two stores, the inmate killed two men without provocation. Turner v. State, 953 So. 2d 1063, 2007 Miss. LEXIS 2 (Miss. 2007).

In a case where defendant was found guilty of capital murder – murder during the commission of sexual battery on a six-month old victim – the death penalty imposed on defendant was (1) not influenced by passion, prejudice, or other existing arbitrary factor; (2) supported by the jury's finding of one or more statutory aggravating circumstances, specifically those set out in Miss. Code Ann. § 99-19-101(5)(d) and (h); (3) not based on invalid statutory aggravating circumstances; and (4) not disproportionate to other cases of that type (death during the commission of a sexual battery of a young victim). Thus, his death penalty was affirmed. Havard v. State, 928 So. 2d 771, 2006 Miss. LEXIS 90 (Miss. 2006), cert. denied, 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153 (U.S. 2007).

In a capital case for the murder of three people, including the strangulation of a four-year-old child, defendant's death sentence was proper pursuant to Miss. Code Ann. §§ 99-19-101(7), 99-19-105(3) and the Eighth and Fourteenth Amendments where the evidence was more than sufficient to support the jury's finding of statutory aggravating circumstances; the sentence was not excessive or disproportionate when compared to other factually similar cases where the death penalty was imposed; the sentence was not imposed under the influence of passion, prejudice, or any other factor; and the jury did not consider any invalid aggravating circumstances. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

In a capital case where three victims were beaten to death during a robbery, a death sentence imposed was not disproportionate to other similar crimes; the evidence supported a finding of the aggravating circumstance of robbery under Miss. Code Ann. § 99-19-105, and there was no evidence that the jury was under the influence of passion, prejudice, or any other arbitrary factor. Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

Upon reviewing defendant's capital murder case under Miss. Code Ann. § 99-19-105(3), there was no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor where the evidence supported the trial court's finding that the statutory aggravating factors of kidnapping, avoiding or preventing a lawful arrest and especially heinous, atrocious and cruel aggravator were proven beyond a reasonable doubt. Upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in this case. Thorson v. State, 895 So. 2d 85, 2004 Miss. LEXIS 1350 (Miss. 2004), cert. denied, 546 U.S. 831, 126 S. Ct. 53, 163 L. Ed. 2d 83, 2005 U.S. LEXIS 6177 (U.S. 2005).

In reviewing the death sentence under Miss. Code Ann. § 99-19-105(3), defendant's death sentence was appropriate because (1) there was no evidence supporting a finding that the sentence imposed was a result of passion, prejudice, or any arbitrary factor; (2) the evidence supported the jury's finding of the statutory aggravator that the crime was committed for pecuniary gain in that in defendant's statement he admitted holding the victim down while he took money from her pocket; and (3) the sentence was not excessive or disproportionate when the facts and circumstances of the case (defendant was actively involved in the bludgeoning of the female victim while robbing her) were compared with those of other cases. Branch v. State, 882 So. 2d 36, 2004 Miss. LEXIS 586 (Miss. 2004), cert. denied, 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289 (U.S. 2005).

Defendant's capital murder convictions and death sentence were proper where there was nothing in the record to suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, Miss. Code Ann. § 99-19-105(3). Brawner v. State, 872 So. 2d 1, 2004 Miss. LEXIS 458 (Miss. 2004).

Defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor and the evidence was more than sufficient to support the jury's finding of the two statutory aggravating circumstances: a capital offense committed in the course of a robbery for pecuniary gain and by a person under a sentence of imprisonment, probation or parole. Further, in comparison to other factually similar cases where the death sentence was imposed, the sentence of death was neither excessive nor disproportionate. Howell v. State, 860 So.

2d 704, 2003 Miss. LEXIS 556 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371 (U.S. 2005).

Defendant's death sentence for the murder of her husband was proper where there was no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, the evidence supported the trial court's finding that the statutory aggravating factor of pecuniary gain was proven beyond a reasonable doubt, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in defendant's case given the equally heinous nature of the crime. Byrom v. State, 863 So. 2d 836, 2003 Miss. LEXIS 535 (Miss. 2003), cert. denied, 543 U.S. 826, 125 S. Ct. 71, 160 L. Ed. 2d 40, 2004 U.S. LEXIS 5754 (U.S. 2004).

Death penalty was neither disproportionate nor excessive for defendant who shot and killed two deputies in a car while the deputies were transporting defendant to prison. Snow v. State, 800 So. 2d 472, 2001 Miss. LEXIS 242 (Miss. 2001), cert. denied, 535 U.S. 1099, 122 S. Ct. 2299, 152 L. Ed. 2d 1056, 2002 U.S. LEXIS 3894 (U.S. 2002), in part, 875 So. 2d 188, 2004 Miss. LEXIS 669 (Miss. 2004).

Trial court did not erroneously allow prosecutor to comment on heinous, atrocious, and cruel aggravator in closing argument in sentencing phase of capital murder trial; record reflected that district attorney was merely restating testimony of doctor who performed autopsy which was a proper comment on the evidence. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Although trial judge properly sustained defendant's objection to language in prosecutor's closing argument that imposition of death penalty would send a message, such language did not require reversal in capital murder trial. Wilcher v. State, 697 So. 2d 1123, 1997 Miss. LEXIS 101 (Miss. 1997).

Prosecutor's "who is the state" argument that "we, the government, are the victims of this crime, the sons, the daughters, the husband, the brothers, the sisters, the grandchildren" did not introduce element of passion, prejudice, or any other arbitrary factor into sentencing hearing, especially where there was no evidence that members of victims' families were present inside the rail at trial. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Prosecutor's "send a message" language in closing argument at sentencing trial did not require reversal, but prosecutors are cautioned against its use. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

In view of fact that defense chose to use imagery in closing argument at sentencing trial to compare defendant to a rabbit, an image that hardly fit person who had already been found guilty of brutally stabbing victim 31 times, state's response using "mad dog" imagery was within latitude granted to counsel during closing arguments. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

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A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

A sentencing jury's failure to make written findings as to mitigating circumstances did not require reversal of a death sentence; § 99-19-103 requires a written enumeration of aggravating circumstances only, and § 99-19-101 has never been read to require an express written list of all the mitigating circumstances which members of the jury may find extant and such a list would often be impracticable because the law requires no consensus among jury members regarding mitigating factors. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73 – the statute under which the defendant pled guilty–defines the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. Stringer v. State, 500 So. 2d 928, 1986 Miss. LEXIS 2609 (Miss. 1986).

Death sentence was not excessive or disproportionate where the 26-year-old defendant killed a convenience store operator during earlier morning hours by blasts from a sawed-off shotgun fired from near-ambush type setting. Wiley v. State, 484 So. 2d 339, 1986 Miss. LEXIS 2405 (Miss.), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278, 1986 U.S. LEXIS 4339 (U.S. 1986), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Death sentence is not disproportionate sentence for defendant convicted of being active participant, if not leader, in deliberate, brutal slaying of peace officer carrying out duties, notwithstanding fact that accomplices in separate capital murder trials receive verdict of life imprisonment. Johnson v. State, 477 So. 2d 196, 1985 Miss. LEXIS 2072 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (U.S. 1986).

Appellate court denying State's motion to reset the execution of defendant's sentence of death imposed by a prior conviction made pursuant to this section would grant the defendant's request for additional time to prepare and file his application for collateral relief in the state court prior to the resetting of the execution date. Wilcher v. State, 462 So. 2d 688, 1984 Miss. LEXIS 2079 (Miss. 1984).

After a defendant had pled guilty to murder, appellate court would deny State's motion for a new date of execution made pursuant to this section and would grant the defendant's request for a 60-day delay to allow him to prepare factual and legal claims under the Mississippi Uniform Post-Conviction and Sentence Collateral Relief Act. Tokman v. State, 462 So. 2d 687, 1984 Miss. LEXIS 2078 (Miss. 1984).

In a capital murder trial, evidence was sufficient to support the conclusion that the murder had been committed during the course of a robbery, where the evidence indicated that defendant had selected the victims and pointed them out to his codefendant, stating to him that they were going to rob the two men, where defendant and codefendant went with the victims to the victims' apartment after that intent had been made known, where the victims had been cold-bloodedly murdered for no demonstrable reason other than taking what they had, where the car of one of the victims had been taken away after he had told defendant, immediately prior to being stabbed, that his money was in the trunk of the car, and where, as soon as practical, the trunk had been searched by defendant, in that no other evidence would be needed for a jury to find that the cold-blooded murder was done to effect a robbery as defined by § 97-3-73; moreover, in reviewing the sentence of death as required by this section, the Supreme Court, would find unhesitatingly that the elements of passion, prejudice, or any other arbitrary factor did not exist in arriving at the jury verdict. Dufour v. State, 453 So. 2d 337, 1984 Miss. LEXIS 1788 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1231, 84 L. Ed. 2d 368, 1985 U.S. LEXIS 1123 (U.S. 1985).

In a prosecution for capital murder of a police officer while acting within his official capacity, evidence supported the jury's findings of statutory aggravating circumstances as enumerated in subsections (2) and (3) of this section. Johnson v. State, 416 So. 2d 383, 1982 Miss. LEXIS 1935 (Miss. 1982).

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the aggravating circumstances (§ 99-19-101), where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. Rigdon v. Russell Anaconda Aluminum Co., 381 So. 2d 983, 1980 Miss. LEXIS 2065 (Miss.), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81, 1980 U.S. LEXIS 3144 (U.S. 1980).

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. Culberson v. State, 379 So. 2d 499, 1979 Miss. LEXIS 2528 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250, 1980 U.S. LEXIS 3943 (U.S. 1980).

In prosecution for the murder of a three-year-old girl, the circumstances in evidence amply supported a finding that the crime was especially heinous, atrocious and cruel and the jury was warranted, from the evidence before it, in finding that the aggravating circumstances outweighed any circumstance that might conceivably have been considered a mitigating circumstance; the death penalty was not imposed wantonly or freakishly or under the influence of passion, prejudice or any other arbitrary factor and was not excessive or disproportionate to similar cases in which such sentence had been imposed. Gray v. State, 375 So. 2d 994, 1979 Miss. LEXIS 2427 (Miss. 1979), cert. denied, 446 U.S. 988, 100 S. Ct. 2975, 64 L. Ed. 2d 847 (U.S. 1980).

The death penalty was properly imposed on defendant where, out of a desire to obtain money, he abducted his victim at gunpoint and fatally shot her when she tried to escape and where he then demanded and received a ransom from his victim's husband. Jordan v. State, 365 So. 2d 1198, 1978 Miss. LEXIS 2435 (Miss. 1978), cert. denied, 444 U.S. 885, 100 S. Ct. 175, 62 L. Ed. 2d 114 (U.S. 1979).

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. Washington v. State, 361 So. 2d 61, 1978 Miss. LEXIS 2344 (Miss. 1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2016, 60 L. Ed. 2d 388, 1979 U.S. LEXIS 1606 (U.S. 1979).

13. —Death penalty reversed.

The admission of evidence of threats made to witnesses by the defendant and evidence of his affiliation with the "black gangster disciples," without proof that any threats were actually made or that he was even a member of any gang, was an impermissible, arbitrary factor that the jury considered in its imposition of the death penalty that prejudiced the defendant. Walker v. State, 740 So. 2d 873, 1999 Miss. LEXIS 184 (Miss. 1999).

Harshness of life sentence in state prison in no way related to defendant's character, his record, or circumstances of his crime, and was properly excluded at capital murder sentencing trial. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Trial court committed reversible error in death penalty phase of murder trial by submitting 5 aggravating factors to jury, 3 of which where unsupported by evidence that could substantiate jury's finding of those factors. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Imposition of death penalty after notice that state would not recommend it violated Fourteenth Amendment due process clause because of insufficient notice that penalty might be imposed; lack of adequate notice created impermissible risk that adversary process might have malfunctioned in case. Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173, 1991 U.S. LEXIS 2786 (U.S. 1991).

State appellate court's reliance on the "especially heinous, atrocious, or cruel" aggravating factor in affirming death sentence was invalid even though the trial court used a limiting instruction to define "especially heinous, atrocious, or cruel" factor, as instruction was not constitutionally sufficient. Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

In a prosecution for capital murder committed during a burglary, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. Coleman v. State, 378 So. 2d 640, 1979 Miss. LEXIS 2542 (Miss. 1979).

14. "Avoiding or preventing lawful arrest or effecting escape from custody".

In a capital murder case, a court properly submitted to the jury the aggravating circumstances that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest where there was sufficient evidence from which it could be reasonably inferred that a substantial reason for killing the victim was to conceal the identity of the killer or killers so as to avoid apprehension and eventual arrest by authorities. Scott v. State, 878 So. 2d 933, 2004 Miss. LEXIS 650 (Miss. 2004).

It was reasonable for the jury to find that a substantial reason for slashing the throats of the two victims to ensure death was to prevent them from informing police who robbed them, thereby avoiding arrest, where (1) the defendant lied to the police in an effort to avoid arrest, (2) the victims knew the defendant, and (3) there was no need for the defendant to kill the victims to fulfill his purpose of robbing them after beating them unconscious. Manning v. State, 735 So. 2d 323, 1999 Miss. LEXIS 130 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

15.-20. [Reserved for future use.]

II. UNDER FORMER § 99-19-59.

21. In general.

Where a conviction for a murder imposing the death sentence had been affirmed by the supreme court, fact that respondent was endeavoring to appeal from the judgment of the federal district court denying his application of a writ of habeas corpus and remanding him to the possession of the superintendent of the state penitentiary, did not prohibit the state supreme court from setting another execution date where respondent had failed to secure a writ of probable cause required by 28 USCS § 2253. Goldsby v. State, 233 Miss. 338, 102 So. 2d 215, 1958 Miss. LEXIS 387 (Miss. 1958).

State supreme court, which had not issued mandate to trial court upon its affirmance of murder conviction imposing death sentence, the date for which had passed before dismissal of appeal by federal supreme court, still had jurisdiction of the case and the power to fix a new date therefor. Wood v. State, 198 Miss. 503, 23 So. 2d 264, 1945 Miss. LEXIS 222 (Miss. 1945).

This section [Code 1942, § 2559] must be construed so as to fit harmoniously into the system of which it is a part. Simmons v. State, 197 Miss. 326, 20 So. 2d 64, 21 So. 2d 822, 1945 Miss. LEXIS 323 (Miss. 1945).

Where Mississippi Supreme Court affirmed murder conviction but failed to issue mandate to the court below, and the federal supreme court dismissed an appeal and its mandate was issued and filed with the clerk of the Mississippi Supreme Court, the latter still had jurisdiction, the date fixed for execution of the death sentence having passed, to fix a new date for the execution thereof. Thornton v. State, 196 Miss. 637, 18 So. 2d 296, 1944 Miss. LEXIS 245 (Miss.), cert. denied, 323 U.S. 668, 65 S. Ct. 76, 89 L. Ed. 543, 1944 U.S. LEXIS 309 (U.S. 1944), modified, 196 Miss. 637, 20 So. 2d 70, 1944 Miss. LEXIS 246 (Miss. 1944).

A circuit judge in vacation has no authority, under this section [Code 1942,

§ 2559] to fix a day for the execution of a sentence. Simmons v. State, 196 Miss. 305, 17 So. 2d 798, 1944 Miss. LEXIS 191 (Miss. 1944).

Where, after mandate of supreme court had been issued and filed in the court below directing it to proceed with the execution of judgment affirming rape conviction, stay of execution for 60 days was granted to permit defendant to apply to the Supreme Court of the United States for a review, but application therefor was not made within such time, trial court was authorized by this section [Code 1942, § 2559] to fix another date for the execution of death sentence. Simmons v. State, 196 Miss. 102, 16 So. 2d 617, 1944 Miss. LEXIS 171 (Miss.), aff'd, 197 Miss. 326, 20 So. 2d 64, 1944 Miss. LEXIS 304 (Miss. 1944).

The governor can grant a respite and fix a later day for the execution. In such case no order of court under the section [Code 1942, § 2559] is necessary. Ex parte Fleming, 60 Miss. 910, 1883 Miss. LEXIS 34 (Miss. 1883).

The statute is but declaratory of the common law. Like proceedings can be had in cases not capital. Ex parte Bell, 56 Miss. 282, 1879 Miss. LEXIS 111 (Miss. 1879).

22. Reasons for delay of execution.

There is no reason for continuance of proceedings to set a new date for execution of sentence where the defendant has been tried and convicted three times on the same cause and where the matters alleged as a basis for a new trial have already been considered on appeal. McGee v. State, 47 So. 2d 155 (Miss. 1950), cert. denied, 340 U.S. 921, 71 S. Ct. 354, 95 L. Ed. 666, 1951 U.S. LEXIS 2270 (U.S. 1951).

"Legal reasons against the execution of the sentence," within the meaning of this section [Code 1942, § 2559], must be based upon happenings which have occurred since, but not at or before, the original trial. Simmons v. State, 197 Miss. 326, 20 So. 2d 64, 21 So. 2d 822, 1945 Miss. LEXIS 323 (Miss. 1945).

Convict's assigned reasons why execution should not be ordered that he was denied due process in that he was put to trial when he was not capable of adequately aiding in his defense because suffering from a wound, and that a confession, used against him, had been procured by force and intimidation, were not sustainable, where he had full knowledge at the time of the trial of both of these matters, and the officers of the court in charge of the prosecution took no measure, actual or constructive, direct or indirect, to suppress or repress the convict's presentation of these matters to the court on his original trial, since he was given full opportunity to be heard. Simmons v. State, 197 Miss. 326, 20 So. 2d 64, 21 So. 2d 822, 1945 Miss. LEXIS 323 (Miss. 1945).

In proceeding under this provision to fix date for hanging, court was not required to order trial on issue of convict's insanity, where he did not allege insanity arose after conviction. Lewis v. State, 155 Miss. 810, 125 So. 419, 1930 Miss. LEXIS 126 (Miss. 1930).

RESEARCH REFERENCES

ALR.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like–post-Gregg cases. 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like–post-Gregg cases. 67 A.L.R.4th 942.

Law Reviews.

1989 Mississippi Supreme Court Review: Sentencing of Criminal Defendant. 59 Miss. L. J. 871, Winter, 1989.

Clark, Juveniles and the death penalty—a square peg in a round hole. 10 Miss. C. L. Rev. 169, Spring, 1990.

§ 99-19-106. Date of execution of death sentence.

When judgment of death becomes final and a writ of certiorari to the United States Supreme Court has been denied or the time for filing such petition has expired, the court shall set an execution date for a person sentenced to the death penalty. Within sixty (60) days following the appointment of post-conviction counsel, upon declaration by counsel that he deems post-conviction review to be meritorious and that he intends to file an application for post-conviction review, the court may stay execution pending the disposition of the post-conviction proceeding. In the event no application for post-conviction relief is filed within one (1) year of the date of the disposition of the petition for writ of certiorari or the time for certiorari has expired, any stay entered by the court will automatically vacate. The filing of a declaration by counsel that he deems post-conviction review to be meritorious and intends to file an application for post-conviction review shall in no manner constitute the filing of an application for post-conviction review that would toll the running of any statute of limitations. Setting or resetting the date of execution shall be made on motion of the state that all state and federal remedies have been exhausted, or that the defendant has failed to file for further state or federal review within the time allowed by law.

HISTORY: Laws of 2000, ch. 569, § 17, eff from and after July 1, 2000.

Editor's Notes — Laws of 2000, ch. 569, § 1, provides:

"SECTION 1. Sections 1 through 18 of this act may be cited as the 'Mississippi Capital Post-Conviction Counsel Act.' "

Sections 1 through 10 of Laws of 2000, ch. 569 are codified at Article 3 of Chapter 39 of this title. Sections 11 through 18 of ch. 569 contain §§ 99-19-105, 99-39-5, 99-39-23, 99-39-27, 99-15-18, 99-39-28, 99-19-106, and the repeal of § 99-19-49.

Cross References — Relief under Mississippi Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant cited no authority for his interpretation of Miss. Code Ann. § 47-7-29 that his death sentence should not be imposed until he finished serving his prior life sentence; the record did not indicate that defendant's parole was ever revoked so as to have his earlier sentence reimposed, and Miss. Code Ann. § 99-19-106 provided that execution should be set on motion of the State after all state and federal remedies were exhausted. Mitchell v. State, 886 So. 2d 704, 2004 Miss. LEXIS 1037 (Miss. 2004), cert. denied, 544 U.S. 1022, 125 S. Ct. 1982, 161 L. Ed. 2d 864, 2005 U.S. LEXIS 3824 (U.S. 2005).

RESEARCH REFERENCES

ALR.

Validity, construction, and operation of Federal Death Penalty Act, 18 U.S.C.A. §§ 3591 et seq. 195 A.L.R. Fed. 1.

§ 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

HISTORY: Laws, 1977, ch. 458, § 5; Laws, 1982, ch. 431, § 6, eff from and after July 1, 1982.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.
3. Constitutionality.

1. In general.

After the supreme court remanded defendant's matter for resentencing and the circuit court resentenced defendant to life imprisonment without the possibility of parole, defendant challenged the applicability of Miss. Code Ann. § 99-19-107; however, defendant's challenge was procedurally barred because defendant failed to raise the issue before the matter was remanded, and further, application of that statute as opposed to Miss. Code Ann. § 97-3-21, which was in effect at the time of the commission of the offense, did not violate ex post facto provisions. Foster v. State, 961 So. 2d 670, 2007 Miss. LEXIS 315 (Miss. 2007), overruled in part, Bell v. State, 160 So. 3d 188, 2015 Miss. LEXIS 4 (Miss. 2015).

This section is reserved for the event when either the Supreme Court of Mississippi or the United States Supreme Court makes a "wholesale declaration" that the death penalty in general, and/or Mississippi's statutory death penalty scheme in particular, is unconstitutional; this section is not intended for use on a case by case basis by trial courts or the Supreme Court in conjunction with an analysis with respect to the requirement, as a prerequisite to imposition of a death sentence, of a finding beyond a reasonable doubt that the defendant killed, attempted to kill, intended that a killing occurred, or contemplated that lethal force would be used. Abram v. State, 606 So. 2d 1015, 1992 Miss. LEXIS 448 (Miss. 1992), overruled in part, Foster v. State, 961 So. 2d 670, 2007 Miss. LEXIS 315 (Miss. 2007), overruled in part, Holly v. Mississippi, 2011 U.S. App. LEXIS 24853 (5th Cir. Miss. Dec. 13, 2011).

2. Applicability.

Circuit court did not err in resentencing defendant to serve a sentence of life without the possibility of parole pursuant to Miss. Code Ann. § 99-19-107 after vacating his death sentence because it correctly applied § 99-19-107 in resentencing defendant, and since defendant's death penalty was found unconstitutional by the United States Supreme Court's ruling in Atkins, the application of § 99-19-107 was appropriate; the statute clearly states that no one whose death penalty was ruled unconstitutional can receive life with parole, and the application of the statute in no way constitutes an ex post facto punishment. Neal v. State, 27 So. 3d 460, 2009 Miss. App. LEXIS 774 (Miss. Ct. App. 2009).

3. Constitutionality.

After finding that defendant's death sentence was unconstitutional, applying a sentence of life without parole violated the prohibition against ex post facto laws because, when defendant was sentenced, a life sentence carried parole eligibility after 10 years, and a sentence of life without parole obviously constricted defendant's opportunity to earn early release, and rendered the punishment for his crime more onerous than when he committed the crime; and applying the 1994 amendments to crimes committed prior to them clearly changed and increased the punishment attached to defendant's crime by adding life without eligibility for parole as an option. Blue v. State, — So. 3d —, 2020 Miss. LEXIS 369 (Miss. Oct. 8, 2020).

RESEARCH REFERENCES

ALR.
Validity, construction, and operation of Federal Death Penalty Act, 18 U.S.C.S. §§ 3591 et seq. 195 A.L.R. Fed. 1.

VICTIM IMPACT STATEMENT ACT

Sec.
99-19-151. Short title.
99-19-153. Declaration of purpose.
99-19-155. Definitions.
99-19-157. Victim impact statement.
99-19-159. Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.
99-19-161. Notice to victim prior to sentencing.

§ 99-19-151. Short title.

Sections 99-19-151 through 99-19-161 shall be known and may be cited as "The Victim Impact Statement Act."

HISTORY: Laws, 1987, ch. 433, § 1, eff from and after July 1, 1987.

§ 99-19-153. Declaration of purpose.

(1) The Legislature finds and declares that:

(a) Protection of the public, restitution to the crime victim and the crime victim's family and just punishment for the harm inflicted are primary objectives of the sentencing process;

(b) The financial, emotional and physical effects of a criminal act on the victim and the victim's family are among the essential factors to be considered in the sentencing of the person responsible for the crime;

(c) In order to impose a just sentence, the court must obtain and consider information about the adverse impact of the crime upon the victim and the victim's family as well as information from and about the defendant; and

(d) The victim of the crime or a relative of the victim is usually in the best position to provide information to the court about the direct impact of the crime on the victim and the victim's family.

(2) Therefore, the Legislature declares that the purpose of Sections 99-19-151 through 99-19-161 is to provide the sentencing court with a victim

impact statement prior to sentencing a convicted offender who has caused physical, emotional or financial harm to a victim as defined herein.

HISTORY: Laws, 1987, ch. 433, § 2, eff from and after July 1, 1987.

JUDICIAL DECISIONS

1. Consideration of victim impact evidence proper.

In a forgery case, a court properly considered victim impact evidence that defendant threatened to kill the victim and her family should she ever help send him to jail, because Miss. Code Ann. § 99-19-153 did not restrict the contents of the victim impact statement to the "financial, emotional and physical" effect of a criminal act on the victim, but instead stated that those were among the essential factors to be considered in sentencing. Defendant's statements indicated a heightened degree of savagery and capacity to inflict emotional damage on the victim, and subsequent to the crime involved, the victim had to change her phone number because of harassing calls from defendant and his family. Swindle v. State, 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

§ 99-19-155. Definitions.

For the purposes of Sections 99-19-151 through 99-19-161, the following words shall have the meanings ascribed herein, unless the context otherwise requires:

(a) "Victim" means an individual who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a felony or an immediate family member of a minor victim or a homicide victim.

(b) "Victim impact statement" means a statement providing information about the financial, emotional and physical effects of the crime on the victim and the victim's family, and specific information about the victim, the circumstances surrounding the crime and the manner in which it was perpetrated.

(c) "Victim representative" means a spouse, parent, child, sibling or other relative of a deceased or incapacitated victim or of a victim who is under fourteen (14) years of age, or a person who has had a close personal relationship with the victim and is designated by the court to be a victim representative.

HISTORY: Laws, 1987, ch. 433, § 3, eff from and after July 1, 1987.

JUDICIAL DECISIONS

ANALYSIS

1. Purpose of statement.
2. Inappropriate content of statement.

1. Purpose of statement.

One of the principal purposes of a victim impact statement is to provide information to the court about the direct impact of the crime on the victim in order to better aid the trial court in imposing "just punishment." Swindle v. State, 881 So. 2d 281, 2003 Miss. App. LEXIS 1062 (Miss. Ct. App. 2003), rev'd, 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

2. Inappropriate content of statement.

In a case where the inmate was convicted of two counts of uttering a forgery, pursuant to Miss. Code Ann, § 99-19-155(b), the contents of the victim's impact statement relating to alleged threats of harm to the victim and her family made 10 years before were improperly admitted at the sentencing hearing and a reasonably competent attorney would find it necessary in the vigorous defense of his client's rights to make some effort to exclude or, at least, counteract such a damaging victim impact statement; thus, trial counsel's failure to do so caused his standard of representation to fall below that required by Strickland and the trial court's decision denying an evidentiary hearing on the inmate's motion for post-conviction relief from his judgment of sentence was reversed. Swindle v. State, 881 So. 2d 281, 2003 Miss. App. LEXIS 1062 (Miss. Ct. App. 2003), rev'd, 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

While it cannot be doubted that a wide-ranging number of factors may be considered by the trial court in determining an appropriate measure of punishment, it remains that, under the clear wording of Miss. Code Ann. § 99-19-155(b), a victim impact statement can properly provide only a specifically limited portion of the relevant information relating to the financial, emotional, and physical effects of the crime on the victim and the victim's family, and specific information about the victim, the circumstances surrounding the crime, and the manner in which it was perpetrated; thus, alleged 10-year-old death threats or threats of serious bodily injury, could not by any imaginable stretch, be said to fall under the circumstances surrounding the crime of issuing two forged checks drawn on the victim's checking account and that evidence was improperly admitted in the inmate's case. Swindle v. State, 881 So. 2d 281, 2003 Miss. App. LEXIS 1062 (Miss. Ct. App. 2003), rev'd, 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

§ 99-19-157. Victim impact statement.

(1) If a court orders the preparation of a presentence evaluation report on a defendant in a felony case, the presentence investigator shall prepare a written victim impact statement for the court which shall be appended to such report. The statement shall include applicable information obtained during consultation with the victim or the victim representative. If the victim or victim representative cannot be located or declines to cooperate in the preparation of the statement, the presentence investigator shall include a notation to that effect in the statement. If there are multiple victims and preparation of individual victim impact statements is not feasible, the presentence investigator may submit one or more representative statements.

(2) If a court does not order the preparation of a presentence evaluation report on a defendant in a felony case, the victim or victim representative may also submit a victim impact statement in one or both of the following ways:

(a) With the permission of the trial court, the victim may present an oral victim impact statement at any sentencing hearing. However, where there are multiple victims, the court may limit the number of oral victim impact statements.

(b) The victim may submit a written statement to the prosecuting attorney, who shall present such statement to the trial judge prior to sentencing.

HISTORY: Laws, 1987, ch. 433, § 4, eff from and after July 1, 1987.

Cross References — Requirement that personnel of division of community services prepare written victim impact statements at the request of a sentencing judge, see § 47-7-9.

JUDICIAL DECISIONS

1. In general.

Defendant failed to explain how letters the victim's friends and family sent to the trial court prejudiced the trial court into imposing a greater sentence because the trial court made an on-the-record finding that it did not need the letters in order to impose the maximum sentence; the letters were admissible at sentencing because the case involved sentencing by a judge, not a jury, so defendant's right to confrontation was not violated. Burgess v. State, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

Victim's sister testified as to the victim's role in her family and the community that the victim moved to help her daughter raise her granddaughter in the country, and how the sister has now had to assume the victim's role as head of the family. The victim impact evidence offered was proper and necessary to a development of the case and true characteristics of the victim and could not serve in any way to incite the jury; thus, it was properly admitted. Branch v. State, 882 So. 2d 36, 2004 Miss. LEXIS 586 (Miss. 2004), cert. denied, 544 U.S. 907, 125 S. Ct. 1595, 161 L. Ed. 2d 282, 2005 U.S. LEXIS 2289 (U.S. 2005).

RESEARCH REFERENCES

ALR.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Victim impact evidence in capital sentencing hearings – post-Payne v. Tennessee. 79 A.L.R.5th 33.

§ 99-19-159. Victim impact statement to be made available to defense and to prosecution; statement as factor in sentencing; cooperation of victim not mandatory.

(1) At least forty-eight (48) hours prior to the date of sentencing, the court shall make available copies of the statement to the defendant, defendant's counsel and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant.

(2) Any victim impact statement submitted to the court under Section 99-19-157 shall be among the factors considered by the court in determining the sentence to be imposed upon the defendant.

(3) Sections 99-19-151 through 99-19-161 shall not be construed to require a victim or victim representative to submit a victim impact statement or to cooperate in the preparation of a victim impact statement.

HISTORY: Laws, 1987, ch. 433, § 5, eff from and after July 1, 1987.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Improper use.

1. In general.

In a forgery case, a court properly considered victim impact evidence that defendant threatened to kill the victim and her family should she ever help send him to jail, because Miss. Code Ann. § 99-19-153 did not restrict the contents of the victim impact statement to the "financial, emotional and physical" effect of a criminal act on the victim, but instead stated that those were among the essential factors to be considered in sentencing. Defendant's statements indicated a heightened degree of savagery and capacity to inflict emotional damage on the victim, and subsequent to the crime involved, the victim had to change her phone number because of harassing calls from defendant and his family. Swindle v. State, 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

Eighth Amendment does not prohibit prosecutor from arguing, or jury from considering, at sentencing phase of capital trial, "victim impact" evidence relating to victim's personal characteristics and emotional impact of murder on victim's family; assessment of harm resulting from crime has long been important concern of criminal law in determining elements of offense and appropriate punishment, and victim impact evidence is merely means of informing sentencing authority as to specific harm caused by crime; contrary decision of Booth v. Maryland (1987) 482 U.S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529, and South Carolina v. Gathers (1989) 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207, are overruled to extent they conflict with this decision. Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720, 1991 U.S. LEXIS 3821 (U.S. 1991).

2. Improper use.

As an apparent safeguard against the improper use of a victim impact statement, the law requires that the statement be submitted at least 48 hours in advance of the sentencing date to the defendant and to defendant's counsel. Swindle v. State, 881 So. 2d 281, 2003 Miss. App. LEXIS 1062 (Miss. Ct. App. 2003), rev'd, 881 So. 2d 174, 2004 Miss. LEXIS 713 (Miss. 2004).

RESEARCH REFERENCES

ALR.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Victim impact evidence in capital sentencing hearings – post-Payne v. Tennessee. 79 A.L.R.5th 33.

§ 99-19-161. Notice to victim prior to sentencing.

The prosecuting attorney shall notify the victim or the victim representative in writing of the date, time and place of any sentencing hearing. If a sentencing hearing is not ordered by the trial judge, the prosecuting attorney shall notify the victim or the victim representative of his right to prepare a written victim impact statement to be considered by the trial judge prior to sentencing. A copy of any relevant rules and regulations pertaining to the victim impact statement and the hearing shall accompany the notice. The notice and the copy of any relevant rules and regulations shall be sent to the last known address of the victim or the victim representative at least five (5) days prior to the sentencing hearing.

HISTORY: Laws, 1987, ch. 433, § 6, eff from and after July 1, 1987.

RESEARCH REFERENCES

ALR.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

HIV AND AIDS TESTING OF PERSONS CONVICTED OF SEX OFFENSES

Sec.
99-19-201. Definitions.
99-19-203. Testing of persons convicted of sex offenses for HIV and AIDS.

§ 99-19-201. Definitions.

The following terms shall have the meanings ascribed to them herein unless the context requires otherwise:

(a) "AIDS" means acquired immunodeficiency syndrome, AIDS related complex and any similar disease.

(b) "HIV" means the human immunodeficiency virus or any other identified causative agent of AIDS.

(c) "Sex offense" means any offense described in Section 45-33-23 or any offense involving the crime of rape.

(d) "Test" means a test to determine the presence of the AIDS disease or the presence of the antibody or antigen to HIV or the presence of HIV infection.

HISTORY: Laws, 1991, ch. 425, § 1; Laws, 2000, ch. 499, § 29, eff from and after July 1, 2000.

Cross References — Registration of sex offenders, see Chapter 33 of Title 45.

§ 99-19-203. Testing of persons convicted of sex offenses for HIV and AIDS.

Any person who is convicted of a sex offense on or after July 1, 1994, and who is sentenced to any state or local correctional facility, placed on probation, given a suspended sentence or other disposition shall be tested for HIV and AIDS by the State Department of Health in conjunction with the State Department of Corrections. An offender who is confined for more than ninety (90) days shall be tested for HIV and AIDS within thirty (30) days before the date of such offender's release. The results of any positive HIV or AIDS tests shall be reported to the victim(s) of such offense and the offender. Any positive HIV or AIDS test results shall also be reported to the victim's spouse and to the spouse of the person who is convicted of such sex offense, if either or both of them are lawfully married. The State Department of Health shall provide counseling and the referral to appropriate treatment for victim(s) of a sex offense where the convicted offender tested positive for HIV or AIDS.

HISTORY: Laws, 1991, ch. 425, § 2; Laws, 1994, ch. 504, § 1, eff from and after July 1, 1994.

Cross References — Registration of sex offenders, see §§ 45-33-21 et seq.

RESEARCH REFERENCES

ALR.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS). 12 A.L.R.5th 149.

Damage action for HIV testing without consent of person tested. 77 A.L.R.5th 541.

ENHANCED PENALTIES FOR OFFENSES COMMITTED FOR DISCRIMINATORY REASONS

Sec.

99-19-301. Penalties subject to enhancement; definitions.
99-19-303. Notice of enhancement.
99-19-305. Sentencing proceedings; required findings for enhanced penalty.
99-19-307. Amount penalty may be enhanced.
99-19-309. Freedom of speech and freedom of assembly not abridged by Sections 99-19-301 through 99-19-307.

§ 99-19-301. Penalties subject to enhancement; definitions.

(1) The penalty for any felony or misdemeanor shall be subject to enhancement as provided in Sections 99-19-301 through 99-19-307 if the felony or misdemeanor was committed because of the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim.

(2) The penalty for any felony or misdemeanor shall be subject to enhancement as provided in Sections 99-19-301 through 99-19-307 if the felony or misdemeanor was committed with the specific intent to target an individual or group because of actual or perceived employment as a law enforcement officer, firefighter or emergency medical technician.

(3) As used in Sections 99-19-301 through 99-19-307:

(a) "Law enforcement officer" means any law enforcement officer, part-time law enforcement officer or law enforcement trainee as defined in Section 45-6-3, as well as any reserve or volunteer law enforcement officer and any federal law enforcement officer or employee whose permanent duties include making arrests, performing search and seizures, execution of criminal arrest warrants, execution of civil seizure warrants, or the care, custody, control or supervision of inmates.

(b) "Firefighter" means any firefighter regularly employed by a fire department of any municipality, county, or fire protection district of the State of Mississippi and includes a volunteer firefighter.

(c) "Emergency medical technician" means a person qualified under Sections 41-59-33 and 41-59-35.

HISTORY: Laws, 1994, ch. 572, § 1; Laws, 2017, ch. 381, § 1, eff from and after July 1, 2017.

Editor's Notes — Chapter 381, Laws of 2017, is known as the "Blue, Red and Med Lives Matter Act."

RESEARCH REFERENCES

ALR.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

§ 99-19-303. Notice of enhancement.

(1) For enhancement of the penalty for a felony offense to apply, the prosecuting attorney if the defendant is charged by information, or grand jury if an indictment is returned, shall provide notice upon the information or indictment that the prosecutor will seek the enhanced penalty provided in Sections 99-19-301 through 99-19-307. The notice shall be in a clause separate from and in addition to the substantive offense charged and shall not be considered as an element of the offense charged.

(2) For enhancement of the penalty for a misdemeanor to apply, the affiant, the prosecuting attorney if the defendant is charged by information, or grand jury if an indictment is returned, shall provide written notice that the enhanced penalty will be sought as provided in Sections 99-19-301 through 99-19-307. The notice shall be in a clause separate from and in addition to the substantive offense charge and shall not be considered as an element of the offense charged.

(3) There shall be no mention in the guilt or innocence phase of the trial or in any documents or evidence seen by the jury that an enhanced penalty may be sought.

HISTORY: Laws, 1994, ch. 572, § 2, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

§ 99-19-305. Sentencing proceedings; required findings for enhanced penalty.

(1) Upon conviction or adjudication of guilt of a defendant where notice has been duly given that an enhanced penalty will be sought as provided in Sections 99-19-301 through 99-19-307, the court shall conduct a separate sentencing proceeding to determine the sentence. The proceeding shall be

conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge shall summon a jury to determine whether an enhanced penalty should be imposed. If trial by jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. Provided, however, that if the defendant enters a plea of guilty and waives trial by jury for the sentencing proceeding, the sentencing proceeding shall be conducted before the trial judge sitting without a jury. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant or his counsel or both defendant and counsel shall be permitted to present arguments for or against any sentence sought.

(2) In order to impose an enhanced penalty under the provisions of Sections 99-19-301 through 99-19-307, the jury must find beyond a reasonable doubt:

(a) That the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated; and

(b) That the defendant maliciously and with specific intent committed the offense because the victim was within the class delineated.

(3) That the victim was within the class delineated means that the reason the underlying crime was committed was the victim's actual or perceived race, color, religion, ethnicity, ancestry, national origin or gender, or that the reason the underlying crime was committed was the victim's actual or perceived employment as a law enforcement officer, firefighter or emergency medical technician.

HISTORY: Laws, 1994, ch. 572, § 3; Laws, 2017, ch. 381, § 2, eff from and after July 1, 2017.

Editor's Notes — Chapter 381, Laws of 2017, is known as the "Blue, Red and Med Lives Matter Act."

RESEARCH REFERENCES

ALR.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

§ 99-19-307. Amount penalty may be enhanced.

If it is found beyond a reasonable doubt that the offense was committed by reason of (a) the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim, or (b) the victim's actual or perceived employment as a law enforcement officer, firefighter or emergency medical technician, then the penalty for the offense may be enhanced by punishment for a term of imprisonment of up to twice that authorized by law for the offense committed, or a fine of up to twice that authorized by law for the offense committed, or both.

HISTORY: Laws, 1994, ch. 572, § 4; Laws, 2017, ch. 381, § 3, eff from and after July 1, 2017.

Editor's Notes — Chapter 381, Laws of 2017, is known as the "Blue, Red and Med Lives Matter Act."

Cross References — Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

RESEARCH REFERENCES

ALR.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like. 22 A.L.R.5th 261.

§ 99-19-309. Freedom of speech and freedom of assembly not abridged by Sections 99-19-301 through 99-19-307.

Nothing in Sections 99-19-301 through 99-19-307 shall abridge freedom of speech or the freedom to peaceably assemble as protected in Article III, Sections 11 and 13 of the Mississippi Constitution of 1890 and the First Amendment of the United States Constitution.

HISTORY: Laws, 2017, ch. 381, § 4, eff from and after July 1, 2017.

Editor's Notes — Chapter 381, Laws of 2017, is known as the "Blue, Red and Med Lives Matter Act."

ENHANCED PENALTIES FOR CRIMES COMMITTED AGAINST ELDERLY PERSONS

Sec.
99-19-351. Penalties subject to enhancement.
99-19-353. Notice of enhancement.
99-19-355. Sentencing proceedings; required findings for enhanced penalty.
99-19-357. Amount penalty may be enhanced.

§ 99-19-351. Penalties subject to enhancement.

The penalty for any felony or misdemeanor which is a crime of violence or the crime of burglary or breaking and entering the dwelling of another shall be subject to enhancement as provided in Sections 99-19-351 through 99-19-357 if the felony or misdemeanor was committed against any victim who is sixty-five (65) years of age or older or who is disabled as described in 42 USCS 12102.

HISTORY: Laws, 2001, ch. 315, § 1; Laws, 2007, ch. 589, § 12, eff from and after July 1, 2007.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint

Legislative Committee on Compilation, Revision and Publication of Legislation corrected a reference near the end of the paragraph. The phrase "this act" was changed to "Sections 99-19-351 through 99-19-357". The Joint Committee ratified the correction at its June 3, 2003 meeting.

Federal Aspects— 42 USCS §§ 12102, referred to in this section, is known as the Americans with Disabilities Act of 1990.

§ 99-19-353. Notice of enhancement.

(1) For enhancement of the penalty for a felony offense to apply, the prosecuting attorney, if the defendant is charged by information, or grand jury, if an indictment is returned, shall provide notice upon the information or indictment that the prosecutor will seek the enhanced penalty provided in Sections 99-19-351 through 99-19-357. The notice shall be in a clause separate from and in addition to the substantive offense charged and shall not be considered as an element of the offense charged.

(2) For enhancement of the penalty for a misdemeanor to apply, the affiant, the prosecuting attorney, if the defendant is charged by information, or grand jury, if an indictment is returned, shall provide written notice that the enhanced penalty will be sought as provided in Sections 99-19-351 through 99-19-357. The notice shall be in a clause separate from and in addition to the substantive offense charge and shall not be considered as an element of the offense charged.

(3) There shall be no mention in the guilt or innocence phase of the trial or in any documents or evidence seen by the jury that an enhanced penalty may be sought.

HISTORY: Laws, 2001, ch. 315, § 2, eff from and after July 1, 2001.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected two references. The phrase "this act" was changed to "Sections 99-19-351 through 99-19-357." The Joint Committee ratified the correction at its June 3, 2003 meeting.

§ 99-19-355. Sentencing proceedings; required findings for enhanced penalty.

(1) Upon conviction or adjudication of guilt of a defendant where notice has been duly given that an enhanced penalty will be sought as provided in Sections 99-19-351 through 99-19-357, the court shall conduct a separate sentencing proceeding to determine the sentence. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge shall summon a jury to determine whether an enhanced penalty should be imposed. If trial by jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. If the defendant enters a plea of guilty and waives trial by

jury for the sentencing proceeding, the sentencing proceeding shall be conducted before the trial judge sitting without a jury. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi. The state and the defendant, or his counsel, or both defendant and counsel, shall be permitted to present arguments for or against any sentence sought.

(2) In order to impose an enhanced penalty under the provisions of Sections 99-19-351 through 99-19-357, the jury must find beyond a reasonable doubt:

(a) That the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated; and

(b) That the defendant maliciously and with specific intent committed the offense to any victim who is sixty-five (65) years of age or older or who is disabled as described in 42 USCS 12102.

HISTORY: Laws, 2001, ch. 315, § 3; Laws, 2007, ch. 589, § 13, eff from and after July 1, 2007.

Federal Aspects— 42 USCS §§ 12102, referred to in this section, is known as the Americans with Disabilities Act of 1990.

JUDICIAL DECISIONS

ANALYSIS

1. Postconviction relief.
2. Waiver of jury.

1. Postconviction relief.

Trial court properly denied defendant's request for post-conviction relief because the sentence imparted to defendant did not exceed the statutory maximum and, therefore, was a legal sentence. Williams v. State, 222 So. 3d 265, 2017 Miss. LEXIS 178 (Miss. 2017).

Applicant's third postconviction relief (PCR) motion based on the right to a sentencing jury was procedurally barred because it was capable of determination at the time of his sentencing; moreover, the claim was barred because it was raised in a second or successive PCR motion. The applicant was not exempt from the procedural bars because the sentence imposed was not illegal; even if the trial court did not specifically confirm on the record that the applicant did not want a sentencing jury, the sentence did not exceed the maximum statutory penalty for the crime of aggravated assault on an elderly victim. Williams v. State, 218 So. 3d 1190, 2016 Miss. App. LEXIS 148 (Miss. Ct. App. 2016), aff'd, 222 So. 3d 265, 2017 Miss. LEXIS 178 (Miss. 2017).

2. Waiver of jury.

Defendant waived his right to have a jury sentence him pursuant to the statute because he pleaded guilty not only to the burglary charge but also to the enhancement; the trial court informed defendant that absent his plea, the State would have to prove all allegations of the indictment, including the enhancement, to a jury, and defendant knew he acted to waive his right to a jury for purposes of the enhancement. Williams v. State, 222 So. 3d 265, 2017 Miss. LEXIS 178 (Miss. 2017).

§ 99-19-357. Amount penalty may be enhanced.

The penalty for the offense may be enhanced by punishment for a term of imprisonment of up to twice that authorized by law for the offense committed, or a fine of up to twice that authorized by law for the offense committed, or both.

HISTORY: Laws, 2001, ch. 315, § 4, eff from and after July 1, 2001.

Cross References — Imposition of standard state assessment in addition to court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Applicant's third postconviction relief (PCR) motion based on the right to a sentencing jury was procedurally barred because it was capable of determination at the time of his sentencing; moreover, the claim was barred because it was raised in a second or successive PCR motion. The applicant was not exempt from the procedural bars because the sentence imposed was not illegal; even if the trial court did not specifically confirm on the record that the applicant did not want a sentencing jury, the sentence did not exceed the maximum statutory penalty for the crime of aggravated assault on an elderly victim. Williams v. State, 218 So. 3d 1190, 2016 Miss. App. LEXIS 148 (Miss. Ct. App. 2016), aff'd, 222 So. 3d 265, 2017 Miss. LEXIS 178 (Miss. 2017).

Because defendant's sentence of thirty years without parole for the offense of kidnapping was within the statutory limits, it was not contrary to the law. Although defendant could have received a life sentence under the kidnapping statute, the State of Mississippi did not seek a life sentence, and defendant's sentence was subject to enhancement because the victim was older than sixty-five, defendant used a gun, and defendant was a habitual offender. Burrell v. State, 183 So. 3d 19, 2015 Miss. LEXIS 531 (Miss. 2015).

ENHANCED PENALTIES FOR UNLAWFUL USE OF FINANCIAL INSTRUMENTS OR IDENTIFYING INFORMATION TAKEN FROM OWNER BY MEANS OF VIOLENT CRIME OR BURGLARY

Sec.
99-19-401. Enhanced penalty; offenses subject to enhancement of penalty; applicable crimes during which instrumentalities were initially obtained.

§ 99-19-401. Enhanced penalty; offenses subject to enhancement of penalty; applicable crimes during which instrumentalities were initially obtained.

(1) Every person convicted in this state of any of the offenses listed in subsection (2) of this section may be sentenced to an additional term of up to five (5) years for the offense listed in subsection (2).

(2) If the conditions set forth in subsection (3) exist, the following crimes, whether misdemeanor or felony, shall be subject to enhancement of penalty as set out in subsection (1):

(a) Section 63-1-60 or 45-35-13 relating to fraudulent use of an identification card or driver's license;

(b) Section 97-19-21 or 97-19-29 relating to fraudulent use of a credit card;

(c) Section 97-19-33 or 97-29-35 relating to false personation;

(d) Section 97-45-19 relating to identity theft;

(e) Section 97-19-39, 97-19-41 or 97-19-85 relating to fraud; and

(f) Section 97-21-23, 97-21-25, 97-21-29, 97-21-37, 97-21-49, 97-21-51, 97-21-53 or 97-21-55 relating to forgery.

(3)(a) The offenses listed in subsection (2) shall be subject to enhancement under subsection (1) in every case in which the instrumentality used in the commission of the subsection (2) offense was initially obtained, whether by the offender or another person, in the course of the commission of at least one (1) of the following crimes:

(i) Section 97-3-7 relating to assault;

(ii) Section 97-3-19, 97-3-25, 97-3-27, 97-3-35 or 97-3-47 relating to homicide;

(iii) Section 97-3-53 relating to kidnapping;

(iv) Section 97-3-73, 97-3-77, 97-3-79 or 97-3-81 relating to robbery;

(v) Section 97-3-117 relating to carjacking;

(vi) Section 97-17-23 or 97-17-33 relating to burglary; or

(vii) Section 97-17-41, 97-17-42, 97-17-43, or 97-17-45 relating to larceny.

(b) For the purposes of this section, "instrumentality" means the credit card, debit card, bank card, bank draft, other document or financial instrument, or any identifying information including an account number taken from the person, possession, custody or control of another during the commission of any of the crimes listed in this subsection.

(4) This section shall not prohibit prosecution under any other criminal statute of this state or the United States.

HISTORY: Laws, 2008, ch. 525, § 1, eff from and after July 1, 2008.

Editor's Notes — Section 97-29-35, referred to in this section, was repealed by § 4 of Chapter 475, Laws of 1979, effective from and after July 1, 1979.

Index

A

ABSENCE FROM STATE.
Limitation on criminal prosecution.
  Inapplicability to person absent from state, §99-1-5.

ACCOMPLICES.
Commission of crime within state by person while out of state, §99-11-25.

ACQUITTAL.
Defect in form of pleading or proceeding.
  No acquittal, §99-11-35.
Former acquittal or conviction in another state, §99-11-23.
Insanity, §99-13-7.
  General provisions, §§99-13-1 to 99-13-11.
Intellectual disability, §99-13-9.
Misdemeanor tried in justice court.
  No bar to prosecution for felony, §99-11-33.
On the merits, §99-11-31.
Variance between indictment and proof or on exception to form, §99-11-29.

ADJUDICATION OF INCOMPETENCY.
Insanity defense, §§99-13-1 to 99-13-11.

ADOLESCENT OPPORTUNITY PROGRAM.
Arrest of counselor.
  Charged with committing offense while performing duties.
    Procedure requirements before issuance of arrest warrant, §99-3-28.

AFFIDAVITS.
Domestic violence.
  Warrantless arrest.
    Misdemeanor or felony which is act of domestic violence, §99-3-7.
Tramps.
  Arrest affidavit, §99-3-27.

AGGRAVATED ASSAULT.
Limitation of actions not applicable, §99-1-5.

AGGRAVATED DOMESTIC VIOLENCE.
Limitation of actions not applicable, §99-1-5.

AIDING AND ABETTING.
Commission of crime within state by person while out of state, §99-11-25.

AIDS AND HIV.
Sex offender testing, §§99-19-201, 99-19-203.
  Sex crimes against minors, persons arrested for.
    HIV and AIDS testing, §99-3-41.

ALCOHOLIC BEVERAGES.
Offenses.
  Indictments.
    Sufficiency of charges, §99-7-29.

ALIAS.
Capias returned not executed, §99-9-1.

ALIAS WARRANT.
Default on recognizance or bond, §99-5-11.

APPEALS.
Criminal appeals.
  Applicability of pre-Mississippi Code of 1972 statutes, §99-1-1.
Criminal cases.
  Detention of defendant pending appeal, §99-19-39.
  Pre-appeal confinement.
    Good time credit, §99-19-23.

APPEARANCE BONDS.
Bail generally, §§99-5-1 to 99-5-39.
Probation, community control, court ordered supervision, other order to produce defendant.
  Condition, forfeiture, failure to appear, §99-5-39.

APPEARANCES.
Bail.
  Failure to appear.
    Forfeiture of bond, §99-5-25.

APPEARANCES —Cont'd
Bail —Cont'd
  Purpose to guarantee appearance, §99-5-25.
Closed circuit television.
  Court appearances.
    Persons in custody or confinement, §99-1-23.
Domestic violence.
  Bail and recognizance.
    Required appearance before judge, §99-5-37.
Failure to appear.
  Forfeiture of bail bond, §99-5-25.
Initial appearance before magistrate.
  Unreasonable or unnecessary delay, §99-3-17.
Special appearances.
  Compelling out-of-state witnesses in criminal cases, §99-9-35.
Web cam.
  Court appearance by means of, §99-1-23.

APPOINTMENT OF COUNSEL.
Indigent criminal defendants, §§99-15-15, 99-15-17 to 99-15-21.
  Compensation of counsel, §§99-15-17 to 99-15-21.
    Allowable fees and expenses, §99-15-17.
    Capital cases, §§99-15-17, 99-15-19.
    Method of payment, §99-15-21.
    Post-conviction release cases involving death penalty, §99-15-18.
    Reimbursement of county in certain cases, §99-15-19.
Youth court proceeding.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.
  Right to counsel.
    Parent or guardian determined by youth court judge to be indigent.
      Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.

ARKANSAS.
Criminal cases.
  Concurrent criminal jurisdiction, §99-11-7.

ARRAIGNMENT.
Closed circuit television.
  Persons in custody or confinement, §99-1-23.
Without unreasonable or unnecessary delay.
  Presenting arrestee before magistrate, §99-3-17.

ARREST, §§99-3-1 to 99-3-45.
Aiding arrest.
  Citizen's aid, §99-3-5.
Background check on persons being arrested, §99-3-43.
Bail agents.
  Arrest of principal, §99-5-27.
Breach of the peace.
  Warrantless arrest permitted, §99-3-7.
Breaking into house.
  Arresting officer or person to effectuate arrest, §99-3-11.
Bucket-shop operators.
  Duty of officers to arrest, §99-3-25.
Citizen assistance to arresting officer, §99-3-5.
Citizens' arrest, §§99-3-1, 99-3-7.
Compelling attendance of witnesses in criminal cases.
  Non-appearing of subpoenaed witness, §§99-9-19, 99-9-25.
  Out-of-state witnesses in criminal cases.
    Exemption from arrest, §99-9-35.
Conservators of the peace.
  Power to arrest and commit offenders, §99-15-5.
Counselors at adolescent opportunity program.
  Charged with committing offense while performing duties.
    Procedure requirements before issuance of arrest warrant, §99-3-28.
Criminal background check on persons being arrested, §99-3-43.
Criminal complaint of non-law enforcement officer, warrant based on.
  Procedural requirements, §99-3-28.
Domestic violence.
  Warrantless arrest.
    Misdemeanor or felony which is act of domestic violence, §99-3-7.
    Violation of bond conditions, §99-5-37.

ARREST —Cont'd
Escaped convicts on suspended sentences, §99-19-27.
Escaped offenders.
  Warrantless arrest, §99-3-15.
Expungement of misdemeanor charges, §99-15-59.
Federal law enforcement officers, §§99-3-1, 99-3-2.
Felony offenses.
  Warrantless arrest permitted, §99-3-7.
Fleeing killer.
  Warrantless arrest, §99-3-35.
Futures dealers.
  Duty of officers to arrest, §99-3-25.
Gamblers.
  Duty of officers to arrest, §99-3-25.
Immunity from liability.
  Legal arrest, §99-3-23.
Indicted persons.
  Arrests in presence of court without process, §99-3-9.
Informing arrestee of why arrested, §99-3-7.
Intensive supervision programs.
  Who may make arrests.
    Person authorized to supervise or monitor convicted offender under program, §99-3-1.
    Warrantless arrest, §99-3-7.
Jail officers.
  Officer charged with committing crime while performing duties.
    Procedure requirements prior to issuance of warrant, §99-3-28.
Judicial officers.
  Arrest of defendants in presence of court without process, §99-3-9.
Jurisdictional scope of warrant.
  Warrant good across county line, §99-3-19.
Justice court judges.
  Issuance of warrant for offender coming into jurisdiction, §99-3-21.
Law enforcement officers.
  Criminal background check on persons being arrested, §99-3-43.
  Interstate jurisdiction, §99-3-13.
  Jailing prisoner for safekeeping, §99-3-13.
  Officer charged with committing crime while in performance of duties.
    Procedure requirements prior to issuance of arrest warrant, §99-3-28.

ARREST —Cont'd
Minors under age 21, notice to be given upon release following arrest, §99-3-45.
Misdemeanor offense.
  Post-arrest release.
    Written notice to appear at later date, §99-3-18.
Perjury.
  Court detention of documents, §99-3-33.
  Warrantless arrest, §99-3-29.
  Witness bound over for grand jury and trial, §99-3-31.
Private persons.
  Who may make arrest, §§99-3-1, 99-3-7.
Probable cause.
  Law enforcement officers, §99-3-7.
Reward for arrest.
  Authority of local governments to offer, §99-3-39.
  Capture of fleeing killer, §§99-3-35, 99-3-37.
    Eligibility of law enforcement officers for reward, §99-3-37.
Sex crimes against minors, persons arrested for.
  HIV and AIDS testing, §99-3-41.
Teachers.
  Procedural requirements for arrest warrants, §99-3-28.
Time or place, §99-3-3.
Tramps.
  Warrantless arrest, §99-3-27.
Unreasonable or unnecessary delays.
  Appearance of arrestee before magistrate, §99-3-17.
Warrantless arrest, §99-3-7.
  Bucket-shop operators, §99-3-25.
  Domestic violence offense.
    Misdemeanor or felony which is act of domestic violence, §99-3-7.
    Violation of bond conditions, §99-5-37.
  Fleeing killer, §99-3-35.
  Futures dealers, §99-3-25.
  Gamblers, §99-3-25.
  Perjurers, §99-3-29.
  Tramps, §99-3-27.
Who may make arrest, §99-3-1.

ARREST WARRANTS.
Criminal complaint of non-law enforcement officer, warrant based on.
  Procedural requirements, §99-3-28.
Indictments.
  Immediate issuance, §99-7-9.
Teachers.
  Procedural requirements, §99-3-28.

ARSON.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Limitation of actions not applicable, §99-1-5.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

ASSAULT.
Aggravated assault.
  Limitation of actions not applicable, §99-1-5.
Children's trust fund.
  Assessment upon person convicted of crime against minor.
    Amount, deposit in fund, §99-19-75.
Evidence.
  Insulting words admissible, §99-17-19.
Insulting words.
  Admissibility at trial, §99-17-19.
Victims of human trafficking and commercial sexual exploitation fund.
  Assessment upon person convicted of crime against minor.
    Amount, deposit in fund, §99-19-75.

ATTORNEYS AT LAW.
Appointment of counsel.
  Indigent criminal defendants, §§99-15-15, 99-15-17 to 99-15-21.
    Compensation of counsel, §§99-15-17 to 99-15-21.
      Allowable fees and expenses, §99-15-17.
      Capital cases, §§99-15-17, 99-15-19.
      Method of payment, §99-15-21.
      Post-conviction release cases involving death penalty, §99-15-18.
      Reimbursement of county in certain cases, §99-15-19.

ATTORNEYS AT LAW —Cont'd
Appointment of counsel —Cont'd
  Youth court proceeding.
    Parent or guardian determined by youth court judge to be indigent.
      Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.
Capital defense counsel division.
  Office of state public defender.
    Employment of private counsel, §99-18-17.
Court-appointed counsel for indigents.
  Criminal cases, §99-15-15.
Criminal procedure.
  Appointment of counsel for indigents, §99-15-15.
  Capital defense counsel division.
    Office of state public defender.
      Employment of private counsel, §99-18-17.
Office of state public defender.
  Capital defense counsel division.
    Employment of private counsel, §99-18-17.
Trial counsel.
  Number of counsel permitted to argue one side, §99-17-11.
Youth courts.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.

ATTORNEYS' FEES.
Appointment of counsel for criminal indigents.
  Compensation of counsel, §§99-15-17 to 99-15-21.
    Allowable fees and expenses, §99-15-17.
    Capital cases, §§99-15-17, 99-15-19.
    Method of payment, §99-15-21.
    Post-conviction release cases involving death penalty, §99-15-18.
    Reimbursement of county in certain cases, §99-15-19.

B

BAIL, §§99-5-1 to 99-5-39.
Alias warrants.
  Defaulters, §99-5-11.

BAIL —Cont'd
Arrest and surrender of principal.
  Surrender by surety, §§99-5-27, 99-5-29.
Binding effect.
  Whether or not properly taken or recited, §99-5-23.
Capital crimes.
  When prisoner entitled to bail, §99-5-35.
Cash bail bonds, §99-5-9.
Certificate of default.
  Failure to appear, §99-5-11.
Conservators of the peace.
  Adjudication of forfeiture for failure to appear in circuit court, §99-15-3.
  Power to take bonds and recognizances, §99-15-3.
Court mandated additional bail, §99-5-13.
Default in not giving bail.
  Mittimus in bailable cases, §99-5-31.
Defective bonds.
  Mittimus to fix, §99-5-31.
Discharge of bail agent's liability.
  Surrender of principal, §99-5-27.
Domestic violence.
  Existence of domestic abuse protection order taken into consideration when fixing bail, §99-5-11.
  Global positioning monitoring system.
    Condition of bond for defendant, §99-5-38.
  Holding period and other conditions of bond, §99-5-37.
  Required appearance before judge, §99-5-37.
  Violation of bond conditions, §99-5-37.
Expiration and renewal, §99-5-5.
Expiration of bond, §99-5-5.
Failure to appear.
  Forfeiture, §99-5-25.
Fidelity or insurance companies.
  Who may give bail, §99-5-7.
Forfeiture of bond, §99-5-25.
  Appearance bond.
    Condition of probation, community control, court ordered supervision.
      Failure to appear, §99-5-39.
  Notice of forfeiture to surety.
    Writ of scire facias, time, §99-5-25.
  Service of process.
    Final judgment served on surety, §99-5-25.

BAIL —Cont'd
Form of bail, §§99-5-1, 99-5-3.
  Bail taken in open court by entry on minutes, §99-5-3.
Hold order.
  Surrender of principal found incarcerated, §99-5-27.
Insufficient bail bond.
  Special bail, person taking, §99-5-19.
Insufficient description of offense.
  Effect of bond, §99-5-21.
Justice court judges.
  Authority to take recognizance or bond, §99-5-11.
Misdemeanor offenses.
  Post-arrest release.
    Written notice to appear at later date, §99-3-18.
  Release on own recognizance, §99-5-11.
Misleading court about proper delivery of writ or judgment.
  Bail bond issued containing misleading information, notice of, §99-5-1.
Multiple counts and one warrant.
  Effect, §99-5-5.
Neglect to take bail bond.
  Special bail, person neglecting, §99-5-19.
Notice of forfeiture to surety.
  Writ of scire facias, time, §99-5-25.
Payable to state, §99-5-5.
Pretrial preventive detention.
  Accused dangerously injuring wounded party.
    Preventive prison detention, §99-5-33.
Probation, community control, court ordered supervision or other order to produce defendant.
  Appearance bond as condition, §99-5-39.
    Forfeiture, failure to appear, §99-5-39.
Purpose, §99-5-25.
Release on own recognizance.
  Misdemeanants, §99-5-11.
Renewal of expired bond, §99-5-5.
Return of defendant on bond, §99-5-27.
Revocation of surety's authority to write bonds, §99-5-25.
Scire facias, §99-5-25.
Service of process.
  Forfeiture of bond.
    Final judgment served on surety, §99-5-25.

BAIL —Cont'd
Sheriffs or custodial officers.
  Approval of sureties, §99-5-15.
  Duty to release defendant from custody, §99-5-15.
  Insufficient bail-bond, §99-5-19.
  Return of bail-bond to clerk, §99-5-17.
  Special bond upon insufficient bail-bond, etc., §99-5-19.
  Surety request for arrest, §99-5-29.
Special bail.
  Person neglecting to take bond or taking insufficient bond, §99-5-19.
Sufficiency of bail.
  Additional bail requirement, §99-5-13.
Surety arrests, §§99-5-27, 99-5-29.
Surrender of principal, §99-5-27.
Validity.
  Whether or not properly taken or recited, §99-5-23.

BAIL BONDSMEN.
Discharge of bail agent's liability.
  Surrender of principal, §99-5-27.

BAILMENTS.
Cash bail bond, §99-5-9.

BIGAMY.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

BILLS OF EXCEPTION.
Criminal cases, §§99-17-39 to 99-17-45.
  Amendment, §99-17-45.
  Attorney's signature upon refusal of judge to sign, §99-17-43.
  Duty of judge to sign, §99-17-39.
  Incapacity of judge to sign, §99-17-41.
  Refusal of judge to sign, §99-17-43.
New trial.
  Grant or refusal assignable for error, §99-17-49.

BLUE, RED AND MED LIVES MATTER ACT.
Crimes targeting first responders.
  Enhanced penalties, §§99-19-301 to 99-19-309.

BONDS, SURETY.
Bail bonds.
  Bail generally, §§99-5-1 to 99-5-39.

BONDS, SURETY —Cont'd
Conservators of the peace.
  Power to require prosecutor and witness to give bond, §99-15-7.

BREAKING AND ENTERING.
Effectuating arrest, §99-3-11.
Enhanced penalties.
  Crimes committed against aged persons, §§99-19-351 to 99-19-357.

BRIBERY.
Burden of proof.
  Proof of conviction of offender, §99-17-21.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Evidence.
  Proof of conviction of offender, §99-17-21.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

BUCKET-SHOPS.
Compelling testimony of witnesses, §99-17-27.
Duty of officers to arrest owners, §99-3-25.

BURDEN OF PROOF.
Bribery.
  Proof of conviction of offender, §99-17-21.
Entrapment.
  Affirmative defense to criminal prosecution, §99-1-25.
Futures contracts.
  Proof of single violation, §99-17-25.
Gambling.
  Proof of single violation, §99-17-25.

BURGLARY.
Aged persons.
  Enhanced penalties for crimes committed against, §§99-19-351 to 99-19-357.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Enhanced penalties.
  Crimes committed against aged persons, §§99-19-351 to 99-19-357.
Limitation of actions not applicable, §99-1-5.

BURGLARY —Cont'd
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

C

CAPITAL COUNSEL DEFENSE DIVISION.
Office of state public defender, §§99-18-1 to 99-18-17.

CAPITAL COUNSEL DEFENSE FUND, §99-18-17.

CAPITAL MURDER.
Indictments.
  Specificity of charges required, §99-17-20.
Manslaughter lesser included crime, §99-19-5.
  Indictment sufficient to charge, §99-7-37.
Sentencing.
  Proceedings generally, §§99-19-51 to 99-19-57, 99-19-101 to 99-19-107.
Validity of indictment, §99-17-20.

CAPITAL OFFENSES.
Bail.
  When prisoner entitled, §99-5-35.
Death penalty.
  Execution of death sentence, §§99-19-51 to 99-19-57.
  Sentencing phase, §§99-19-101 to 99-19-107.
Indictments.
  Specificity of pleading, §99-17-20.
Murder.
  Manslaughter lesser included crime, §99-19-5.
    Indictment sufficient to charge, §99-7-37.
  Specificity of charges required, §99-17-20.
  Validity of indictment, §99-17-20.
Punishment.
  Jury to determine, §99-19-101.

CAPITAL PUNISHMENT.
Death penalty.
  Execution of death sentence, §§99-19-51 to 99-19-57.
  Sentencing phase, §§99-19-101 to 99-19-107.

CARELESS DRIVING.
Standard state monetary assessment, §99-19-73.

CASH BAIL BONDS, §99-5-9.

CHILD ABUSE AND NEGLECT.
Youth court proceedings.
  Public defender representation of parent determined to be indigent, §99-18-13.

CHILD PORNOGRAPHY.
Reproduction of evidentiary materials during discovery.
  Prohibition, §99-1-29.

CHILDREN AND MINORS.
Arrest of minor under age 21.
  Notice to be given upon release following arrest, §99-3-45.
Expungement of records.
  Felony convictions while under 18, §99-19-71.
Sex crimes against children.
  HIV and AIDS testing of persons arrested, §99-3-41.

CHILDREN'S TRUST FUND.
Assessment on certain offenses affecting children.
  Amount, deposit in fund, §99-19-75.

CIRCUIT COURTS.
Clerks.
  Collection of fines, penalties and forfeitures.
    Failure to issue executions or transmit list, §99-19-65.
  Secret record book of indictments, §99-7-13.

CITIZEN'S ARREST, §§99-3-1, 99-3-7.

CLERGY.
Death penalty executions.
  Witness, §99-19-55.

CLERKS OF COURT.
Circuit courts.
  Collection of fines, penalties and forfeitures.
    Failure to issue executions or transmit list, §99-19-65.

CLOSED CIRCUIT TELEVISION.
Court appearances.
  Persons in custody or confinement, §99-1-23.

COMMENCEMENT OF ACTIONS.
Criminal prosecutions, §99-1-7.

COMMON LAW.
Indictments.
  Offenses indictable at common law, §99-7-1.
    Offenses not provided for by statute, §99-1-3.

COMMUNITY SERVICE.
Sentencing in lieu of payment of fine, §99-19-20.

COMPELLING ATTENDANCE OF WITNESSES IN CRIMINAL CASES, §§99-9-11 to 99-9-25.
Arrest for non-appearing subpoenaed witness, §99-9-19.
Discharge of witness, §99-9-21.
Grand jury witnesses, §§99-9-23, 99-9-25.
Out-of-state witnesses, §§99-9-27 to 99-9-37.
  Citation of act, §99-9-27.
  Construction of act, §99-9-37.
  Definitions, §99-9-29.
  Exemption from arrest and service of process, §99-9-35.
  Summoning witness from another state to testify in state, §99-9-33.
  Summoning witness in state to testify in another state, §99-9-31.
Scire facias for defaulters, §99-9-21.
Service of subpoena, §99-9-17.
Subpoenas for witnesses, §§99-9-11 to 99-9-17.
  Depositions for use in another state, §99-9-13.
  Service, §99-9-17.
  Witness for nearby county during circuit court term, §99-9-15.

COMPETENCY TO STAND TRIAL.
Insanity defense, §§99-13-1 to 99-13-11.

CONFESSIONS.
Conviction upon open court confession, §99-19-3.
Pretrial intervention program.
  Referral to program as inducement for confession, §99-15-125.

CONFIDENTIALITY OF INFORMATION.
Death penalty.
  Execution of death sentence.
    Identity of execution team members confidential, §99-19-51.

CONFLICTS OF INTEREST.
Capital counsel division.
  Office of state public defender, §99-18-17.
Office of state public defender.
  Capital counsel division, §99-18-17.

CONSERVATORS OF THE PEACE.
Pretrial proceedings, §99-15-1.
  Arrest and commitment of offenders, §99-15-5.
  Bail and recognizance.
    Power to take, §99-15-3.
  Designation of judges of specific courts, §99-15-1.
  Prosecutors and witnesses.
    Authority to require bonds, §99-15-7.
  Search warrant for stolen property.
    Authority to issue, §99-15-11.
  Subpoena powers, §99-15-9.
Taking recognizance or bond, §99-5-11.

CONSPIRACY.
Limitation of actions for criminal prosecution, §99-1-5.

CONSTABLES.
Reward for apprehension of fleeing killer, §99-3-37.

CONTINUANCES.
Criminal cases, §§99-15-29 to 99-15-33.
  Admission of facts in absence of witness, §99-15-33.
  Application, §99-15-29.
  Capital cases, §99-15-31.
Variance between indictment and proof, §99-17-13.

CONTRACTS.
Futures contracts.
  Burden of proof.
    Proof of single violation, §99-17-25.
  Dealers.
    Duty of officers to arrest, §99-3-25.
  Witnesses.
    Compelling testimony, §99-17-27.

CORONERS.
Death penalty.
  Pronouncement of death, §99-19-51.

CORPORATIONS.
Criminal prosecutions.
  Appearing to indictment.
    When considered, §99-9-3.
  Execution of summons, §99-9-3.
  Issuance of summons to appear and answer, §99-9-3.

CORPORATIONS —Cont'd
Criminal prosecutions —Cont'd
  Judgment upon conviction, §99-9-3.
  Nonresident or not found in state.
    Mailing and publishing order to appear, §99-9-7.
  Proceedings before justice of peace, §99-9-9.
  Process of execution issued against goods and chattels, lands and tenements, §99-9-3.
  Sale of goods and chattels, lands and tenements, §99-9-3.
  Summons issued to other counties, §99-9-5.

CORPSES.
Unclaimed dead bodies.
  Death penalty.
    Sole charge of burial of unclaimed body, §99-19-55.

COSTS.
Change of venue in criminal cases.
  Cost paid by county from which venue transferred, §99-15-45.
Criminal prosecutions.
  Assessment against convicted defendant to cover costs of investigation, §99-19-77.
Death penalty.
  Execution of death sentence.
    Payment of deputy state executioner, §99-19-53.
Post-conviction proceedings.
  Offender in custody of department of corrections.
    Cases not heard during term of court, §99-19-42.
Search warrants, §99-1-11.

COUNTERFEITING.
Limitation of actions not applicable, §99-1-5.

COUNTY TREASURERS.
Cash bail bond, §99-5-9.

CREDIT CARD FRAUD.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.

CREDIT CARDS.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.

CREDIT CARDS —Cont'd
Fraud.
  Enhanced penalties.
    Stolen instrumentalities of identity, crimes committed with, §99-19-401.

CRIMES.
Abuse, neglect, exploitation of vulnerable persons.
  Limitation of actions for criminal prosecution, §99-1-5.
Aged persons.
  Enhanced penalties for crimes committed against, §§99-19-351 to 99-19-357.
Careless driving.
  Standard state monetary assessment, §99-19-73.
Criminal sexual assault protection order.
  Warrantless arrest permitted for violation, §99-3-7.
Elderly persons.
  Enhanced penalties for crimes committed against, §§99-19-351 to 99-19-357.
Inmates committing crime outside boundary of penitentiary.
  Cost of trial and/or execution of convict, §99-19-61.
Protective orders.
  Criminal sexual assault protection order.
    Warrantless arrest permitted for violation, §99-3-7.
Reckless driving.
  Standard state monetary assessment, §99-19-73.
Senior citizens.
  Enhanced penalties for crimes committed against, §§99-19-351 to 99-19-357.
Sentencing, §§99-19-1 to 99-19-357.
Sex crimes against children.
  HIV and AIDS testing of persons arrested, §99-3-41.
Speeding.
  Standard state monetary assessment, §99-19-73.

CRIME SOLVERS' REWARDS.
Arrest and delivery of fleeing killer, §§99-3-35, 99-3-37.

CRIME VICTIMS.
Impact statements, §§99-19-151 to 99-19-161.

CRIMINAL HISTORY RECORD CHECKS.
Arrest.
  Background check on persons being arrested, §99-3-43.

CRIMINAL PROCEDURE.
Adoption of Mississippi Code of 1972.
  Applicability of statutes prior to adoption, §99-1-1.
Appointment of counsel for indigents, §99-15-15.
  Compensation, §§99-15-17 to 99-15-21.
Arraignment.
  Closed circuit television.
    Persons in custody or confinement, §99-1-23.
  Without unreasonable or unnecessary delay.
    Presenting arrestee before magistrate, §99-3-17.
Arrests.
  General provisions, §§99-3-1 to 99-3-45.
Assessment on persons convicted to cover investigative costs, §99-19-77.
Attorneys at law.
  Appointment of counsel for indigents, §99-15-15.
    Compensation, §§99-15-17 to 99-15-21.
Bail and recognizance.
  General provisions, §§99-5-1 to 99-5-39.
Capital cases.
  Death penalty.
    Sentencing phase, §§99-19-101 to 99-19-107.
Change of venue, §§99-15-35 to 99-15-45.
Child pornography, evidence constituting.
  Reproduction of materials during discovery.
    Prohibition, §99-1-29.
Children's trust fund.
  Assessment on persons convicted of certain crimes affecting children.
    Amount, deposit in fund, §99-19-75.
Closed circuit television.
  Court appearances.
    Persons in custody or confinement, §99-1-23.

CRIMINAL PROCEDURE —Cont'd
Commencement of prosecution, §99-1-7.
Common law.
  Offenses indictable at common law, §99-7-1.
    Offenses not provided for by statute, §99-1-3.
Continuances, §§99-15-29 to 99-15-33.
Corporations.
  Appearing to indictment.
    When considered, §99-9-3.
  Execution of summons, §99-9-3.
  Issuance of summons to appear and answer, §99-9-3.
  Judgment upon conviction, §99-9-3.
  Nonresident or not found in state.
    Mailing and publishing order to appear, §99-9-7.
  Proceedings before justice of peace, §99-9-9.
  Process of execution issued against goods and chattels, lands and tenements, §99-9-3.
  Sale of goods and chattels, lands and tenements, §99-9-3.
  Summons issued to other counties, §99-9-5.
Court-appointed counsel for indigents, §99-15-15.
  Compensation, §§99-15-17 to 99-15-21.
Death penalty.
  Execution of death sentence, §§99-19-51 to 99-19-57.
  Life imprisonment without parole, §§99-19-101 to 99-19-107.
  Sentencing phase, §§99-19-101 to 99-19-107.
Deferred prosecution.
  Dismissal of action upon successful completion of court-imposed conditions, §99-15-26.
Delayed sentencing.
  Dismissal of action after entry of plea of guilty.
    Successful completion of court-imposed conditions, §99-15-26.
Dismissal of action.
  Successful completion of court-imposed conditions, §99-15-26.
Domestic violence cases.
  Plea of guilty, withholding of acceptance pending completion of conditions imposed by court, §99-15-26.

CRIMINAL PROCEDURE —Cont'd
Entrapment.
  Affirmative defense, burden of proof, §99-1-25.
Expungement of misdemeanor charges, §99-15-59.
Indictments.
  General provisions, §§99-7-1 to 99-7-41.
Indigent persons.
  Appointment of counsel, §99-15-15.
    Compensation, §§99-15-17 to 99-15-21.
Insanity defense, §§99-13-1 to 99-13-11.
Investigations.
  Assessment on persons convicted to cover investigative costs, §99-19-77.
Lesser included offenses.
  Jury finding defendant guilty, §99-19-5.
  Murder indictment.
    Sufficient to charge lesser crime of manslaughter, §99-7-37.
Lie detector tests.
  Not to be requested or required of sex offense victims, §99-1-27.
Limitations period for prosecutions.
  Methods of commencing prosecution, §99-1-7.
  Offenses for which no limitations period applicable, §99-1-5.
  Time periods for specified criminal offenses, §99-1-5.
New laws.
  No retroactive effect, §99-19-1.
Pre-existing laws.
  Imposition of modified milder penalty, §99-19-33.
Presence of defendant at trial.
  Waiver, §99-17-9.
Pretrial intervention program.
  General provisions, §§99-15-101 to 99-15-127.
Pretrial services.
  General provisions, §§99-15-101 to 99-15-127.
Prospective application of new laws, §99-19-1.
Sentencing.
  Death penalty cases, §§99-19-101 to 99-19-107.
  General provisions, §§99-19-1 to 99-19-77.

CRIMINAL PROCEDURE —Cont'd
Sentencing —Cont'd
  Habitual offenders, §§99-19-81 to 99-19-87.
  Victim impact statements, §§99-19-151 to 99-19-161.
Sex offense victims.
  Lie detector tests.
    Not to be requested or required of, §99-1-27.
Standard state monetary assessment, §99-19-73.
Statutory changes of law.
  No retroactive effect, §99-19-1.
Summons and process.
  General provisions, §§99-9-1 to 99-9-37.
Time limitations on prosecutions.
  Methods for commencing prosecution, §99-1-7.
  Offenses for which no limitations period applicable, §99-1-5.
  Time periods for specified criminal offenses, §99-1-5.
Trafficking in controlled substances.
  Dismissal of action on successful completion of court-imposed conditions, exceptions for certain offenses, §99-15-26.
  Intervention program ineligibility, §99-15-107.
Trial.
  General provisions, §§99-17-1 to 99-17-49.
Victims of crime.
  Impact statements, §§99-19-151 to 99-19-161.
  Informing victim as to status of charge, §99-7-9.
  Lie detector tests not to be requested or required of sex offense victims, §99-1-27.
Victims of human trafficking and commercial sexual exploitation fund.
  Assessment on persons convicted of certain crimes affecting children.
    Amount, deposit in fund, §99-19-75.

D

DEAD BODIES.
Death penalty.
  Disposal of body, §99-19-55.

DEAD BODIES —Cont'd
Unclaimed dead bodies.
  Death penalty.
    Sole charge of burial of unclaimed body, §99-19-55.

DEAF AND HEARING IMPAIRED.
Interpreters.
  Criminal cases, §99-17-7.

DEATH PENALTY.
Appointment of counsel, §§99-15-17, 99-15-18.
  Capital defense counsel division.
    Office of state public defender, §§99-18-1 to 99-18-17.
Capital defense counsel division.
  Office of state public defender, §§99-18-1 to 99-18-17.
Capital murder and other capital crimes.
  Specificity of indictment required, §99-17-20.
Change of venue in capital cases, §99-15-43.
Continuances in capital cases, §99-15-31.
Date of execution of death sentence, §99-19-106.
Docket of death eligible cases in state.
  Capital defense director, capital defender to keep, §99-18-15.
Execution of death sentence, §§99-19-51 to 99-19-57.
  Attending physicians, §§99-19-53, 99-19-55.
  Certificate of execution, §99-19-55.
  Cost of trial and/or execution of non-resident of Sunflower county, §99-19-61.
  Disposal of body, §99-19-55.
  Execution team, §99-19-51.
  Female death row inmates, §99-19-55.
  Insane inmate.
    Suspension of sentence, §99-19-57.
  Lethal injection, §99-19-51.
  Manner of execution, §99-19-51.
  Non-legal resident of Sunflower county, §99-19-61.
  Pregnant inmate.
    Suspension of sentence, §99-19-57.
  Procedure, §99-19-55.
  Pronouncement of death, §99-19-51.
  State executioner, §§99-19-53, 99-19-55.

DEATH PENALTY —Cont'd
Execution of death sentence —Cont'd
  Time of execution, §99-19-55.
  Witnesses, §99-19-55.
Habitual offenders.
  Punishment by death unaffected, §99-19-87.
Imprisonment for life.
  Failure of jury to agree on punishment, §99-19-103.
Indictments.
  Copy of indictment and special venire to be given to defendant, §99-15-27.
  Joint indictments.
    Severance of charges, §99-15-47.
  Validity of indictment, §99-17-20.
Life imprisonment without parole.
  Unconstitutionality of death sentence, §99-19-107.
Office of state public defender.
  Capital defense counsel division, §§99-18-1 to 99-18-17.
Peremptory challenges in capital cases, §99-17-3.
Roster of death penalty cases in state.
  Capital defense director, capital defender to keep, §99-18-15.
Sentencing phase, §§99-19-101 to 99-19-107.
  Arguments by counsel, §99-19-101.
  Automatic review by state supreme court, §99-19-101.
  Consideration of aggravating and mitigating circumstances, §99-19-101.
  Date of execution of death sentence, §99-19-106.
  Deliberations by jury, §99-19-101.
  Effect of jury's failure to agree on punishment, §99-19-103.
  Effect of unconstitutionality of death sentence, §99-19-107.
  Empaneling of jury, §99-19-101.
  Finality of judgment, §99-19-105.
  Jury determination in capital cases, §99-19-101.
  Jury's specific written findings of fact, §99-19-101.
  Life imprisonment.
    Failure of jury to agree on punishment, §99-19-103.
  Life imprisonment without parole.
    Unconstitutionality of death sentence, §99-19-107.

DEATH PENALTY —Cont'd
Sentencing phase —Cont'd
  Limitation on aggravating circumstances, §99-19-101.
  Mandatory finding by jury, §99-19-101.
  Priority of supreme court review, §99-19-101.
  Review by state supreme court.
    Finality of judgment, §99-19-105.
    Standard of review, §99-19-105.
  Review by United States supreme court, §99-19-105.
  Statutory aggravating circumstances required, §§99-19-101, 99-19-103.
  Statutory jury instructions, §99-19-103.
  Trial judge to conduct, §99-19-101.
  Unanimous written vote.
    Imposition of death sentence, §99-19-101.
Suspension of death sentence.
  Insane or pregnant death row inmate, §99-19-57.
Venue.
  Change of venue in capital cases, §99-15-43.

DEBIT CARDS.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.

DEFAMATION.
Criminal libel.
  Indictments, §99-7-33.

DEFENDANT'S COMPETENCY TO STAND TRIAL.
Insanity defense, §§99-13-1 to 99-13-11.

DEFENSES.
Dueling.
  Compelled testimony against participants, §99-17-23.
Entrapment.
  Affirmative defense to criminal prosecution, burden of proof, §99-1-25.

DEFERRED PROSECUTION.
Dismissal of action upon successful completion of court-imposed conditions, §99-15-26.

DEFINED TERMS.
AIDS.
  Testing of sex offenders, §99-19-201.

DEFINED TERMS —Cont'd
Appropriate anesthetic or sedative.
  Execution of death sentence, §99-19-51.
Domestic violence.
  Global positioning monitoring system condition of bail bond, §99-5-38.
Emergency medical technician.
  Crimes targeting first responders, enhanced penalties, §99-19-301.
Firefighter.
  Crimes targeting first responders, enhanced penalties, §99-19-301.
Global positioning monitoring system.
  Bail bond in domestic violence cases, §99-5-38.
HIV.
  Testing of sex offenders, §99-19-201.
Insane.
  Suspension of death sentence, §99-19-57.
Instrumentality.
  Criminal procedure, §99-19-401.
Intensive supervision program.
  Arrests, §§99-3-1, 99-3-7.
Law enforcement officers.
  Crimes targeting first responders, enhanced penalties, §99-19-301.
Misdemeanor or felony that is an act of domestic violence.
  Warrantless arrest, §99-3-7.
Noncriminal disposition.
  Pretrial intervention program, §99-15-103.
Person with mental retardation.
  Insanity defense, §99-13-1.
Prosecutorial discretion.
  Pretrial intervention program, §99-15-103.
Sex offense.
  HIV and AIDS testing, §99-19-201.
State.
  Compelling out-of-state witnesses in criminal cases, §99-9-29.
Supplier of lethal injection chemicals.
  Execution of death sentence, §99-19-51.
Surrender.
  Bail, §99-5-27.
Tests.
  HIV and AIDS testing, §99-19-201.
Victim.
  Victim impact statements, §99-19-155.

DEFINED TERMS —Cont'd
Victim impact statement.
  Sentencing, §99-19-155.
Victim representative.
  Victim impact statements, §99-19-155.
Witness.
  Compelling out-of-state witnesses in criminal cases, §99-9-29.

DELAYED SENTENCING.
Dismissal of action after entry of plea of guilty.
  Successful completion of court-imposed conditions, §99-15-26.

DEMURRERS.
Indictments.
  When filed, §99-7-21.

DENTISTS.
Arson.
  Conviction bar to practice of dentistry, §99-19-35.
Bigamy.
  Conviction bar to practice of dentistry, §99-19-35.
Bribery.
  Conviction bar to practice of dentistry, §99-19-35.
Burglary.
  Conviction bar to practice of dentistry, §99-19-35.
Embezzlement.
  Conviction bar to practice of dentistry, §99-19-35.
False pretenses, obtaining money or goods under.
  Conviction bar to practice of dentistry, §99-19-35.
Forgery.
  Conviction bar to practice of dentistry, §99-19-35.
Perjury.
  Conviction bar to practice of dentistry, §99-19-35.
Theft.
  Conviction bar to practice of dentistry, §99-19-35.

DEPOSITIONS.
Compelling attendance of witnesses in criminal cases.
  Issuance of subpoena for use in another state, §99-9-13.

DISCOVERY.
Child pornography, evidence constituting.
  Prohibition on reproduction of materials during discovery, §99-1-29.

DISCRIMINATION.
Hate crimes, §§99-19-301 to 99-19-309.

DISMISSAL OF ACTIONS.
Criminal cases.
  Completion of court-imposed conditions, §99-15-26.
  Court-imposed conditions, §§99-15-26, 99-15-57.
  Dismissal at defendant's cost, §99-15-53.
  Entry of compromise or nolle prosequi without consent of court, §99-15-53.
  Petit misdemeanor charge upon satisfaction of injured party, §99-15-51.
Expungement of misdemeanor charges, §99-15-59.

DISQUALIFICATION FROM HOLDING OFFICE, §99-19-35.

DISTRICT ATTORNEYS.
Pretrial intervention program.
  General provisions, §§99-15-101 to 99-15-127.
  Role of district attorney, §§99-15-105, 99-15-117.

DOCKETS.
Death eligible cases in state.
  Capital defense director, capital defender to keep, §99-18-15.

DOMESTIC VIOLENCE.
Aggravated domestic violence.
  Limitation of actions not applicable, §99-1-5.
Arrest.
  Warrantless arrest.
    Misdemeanor or felony which is act of domestic violence, §99-3-7.
    Violation of bond conditions, §99-5-37.
Bail and recognizance.
  Existence of domestic abuse protection order taken into consideration when fixing bail, §99-5-11.

DOMESTIC VIOLENCE —Cont'd
Bail and recognizance —Cont'd
  Global positioning monitoring system.
    Condition of bond for defendant, §99-5-38.
  Holding period and other conditions of bond, §99-5-37.
  Required appearance before judge, §99-5-37.
  Violation of bond conditions, §99-5-37.
Global positioning monitoring system.
  Bail.
    Condition of bond for defendant, §99-5-38.
Guilty plea.
  Withholding of acceptance pending completion of conditions imposed by court, §99-15-26.
Protective orders.
  Bail and recognizance.
    Existence of domestic abuse protection order taken into consideration when fixing bail, §99-5-11.
Warrantless arrest.
  Misdemeanor or felony which is act of domestic violence, §99-3-7.

DOUBLE JEOPARDY.
Acquittal for variance between indictment and proof or on exception to form, §99-11-29.
Acquittal on the merits, §99-11-31.
Acquittal or conviction for misdemeanor not bar to felony prosecution, §99-11-33.
Former acquittal or conviction in another state, §99-11-27.

DRIVERS' LICENSES.
Fraudulent use.
  Enhanced penalties.
    Stolen instrumentalities of identity, crimes committed with, §99-19-401.

DRIVING UNDER THE INFLUENCE.
Chemical tests to determine presence of alcohol or drugs.
  Implied consent.
    Standard state monetary assessment for implied consent law violations, §99-19-73.

DRIVING UNDER THE INFLUENCE —Cont'd
Fine.
  Standard state monetary assessment for violations, §99-19-73.
Standard state monetary assessment for violations, §99-19-73.

DRUGS AND CONTROLLED SUBSTANCES.
Trafficking in controlled substances.
  Dismissal of action on successful completion of court-imposed conditions, exceptions for certain offenses, §99-15-26.
  Intervention program ineligibility, §99-15-107.

DUELING.
Evidence.
  Compelling participants to testify against another, §99-17-23.
Witnesses.
  Compelling participants to testify against another, §99-17-23.

E

ELECTROCUTION.
Death penalty.
  Execution of death sentence, §99-19-51.

ELECTRONIC MONITORING OF SEX OFFENDERS.
Condition of probation, §99-19-84.

EMBEZZLEMENT.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Indictments.
  Sufficiency of charges, §99-7-31.
Jurisdiction, §99-11-11.
Limitation of actions not applicable, §99-1-5.
Mandatory minimum sentence.
  Public funds unlawfully taken, §99-19-18.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public funds unlawfully taken.
  Mandatory minimum sentence, §99-19-18.

EMBEZZLEMENT —Cont'd
Public officers and employees.
  Disqualification to hold office, §99-19-35.
Sentencing.
  Mandatory minimum sentence.
    Public funds unlawfully taken, §99-19-18.
Venue, §99-11-11.

EMERGENCY MEDICAL SERVICES.
Crimes targeting first responders.
  Enhanced penalties, §§99-19-301 to 99-19-309.

ENTRAPMENT.
Affirmative defense to criminal prosecution, burden of proof, §99-1-25.

EVIDENCE.
Assault and battery.
  Insulting words admissible, §99-17-19.
Bribery.
  Proof of conviction of offender, §99-17-21.
Child pornography.
  Prohibition on reproduction of materials during discovery, §99-1-29.
Dueling.
  Compelling participants to testify against another, §99-17-23.
Futures contracts.
  Proof of single violation, §99-17-25.
Gambling.
  Proof of single violation, §99-17-25.

EXHIBITS.
Criminal jury trials.
  Papers read into evidence.
    Jurors may carry into jury room, §99-17-37.

EXPUNGEMENT OF RECORDS.
Expenses of district attorneys defrayed by appropriation, §99-19-72.
Felony convictions for certain offenses, §99-19-71.
  Petition filing fee, §99-19-72.
Generally, §99-15-57.
Misdemeanor charges, §99-15-59.
Misdemeanor convictions, first offenses, §99-19-71.
Pretrial intervention program, completion, §99-15-123.

F

FALSE PERSONATION.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.

FALSE PRETENSES.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

FEES.
Expungement of records.
  First offenses, petition filing fee, §99-19-72.
Interpreters for the deaf and hearing impaired.
  Criminal cases, §99-17-7.
Probation.
  Transmittal of probation order, §99-19-45.
Sentencing.
  Transmittal of probation order, §99-19-45.

FELONIES.
Expungement of certain felony convictions, §99-19-71.
Indictments.
  Joint indictments.
    Severance of charges, §99-15-47.
Standard state monetary assessment, §99-19-73.

FINES.
Careless driving.
  Standard state monetary assessment, §99-19-73.
Collection of fines and assessments, §99-19-65.
Criminal investigations.
  Assessment on persons convicted to cover investigative costs, §99-19-77.
Criminal justice fund.
  Disposition of criminal fines and assessments, §99-19-32.
Default on executions.
  Liability of officers, §99-19-67.

FINES —Cont'd
Escape of inmate upon failure to levy.
  Remedy against peace officer, §99-19-67.
Felonies.
  Standard state monetary assessment, §99-19-73.
Futures contracts.
  Refusal of witness to testify after grant of immunity, §99-17-27.
Gambling.
  Refusal of witness to testify after grant of immunity, §99-17-27.
Game and fish law violations.
  Standard state monetary assessment, §99-19-73.
Implied consent violations.
  Standard state monetary assessment, §99-19-73.
Imposition of fine.
  Criminal cases, §99-19-20.
    Nonpayment, no automatic incarceration, §99-19-20.1.
Imprisonment for nonpayment.
  Criminal cases, §99-19-20.
    No automatic incarceration, §99-19-20.1.
Installment payments.
  Criminal cases, §99-19-20.
Misdemeanors.
  Standard state monetary assessment, §99-19-73.
Motor vehicle insurance.
  Violations.
    Standard state monetary assessment, §99-19-73.
Payment of fines.
  Criminal cases, §99-19-20.
    Nonpayment, no automatic incarceration, §99-19-20.1.
Penalty not fixed by statute, §99-19-31.
Reckless driving.
  Standard state monetary assessment, §99-19-73.
Sheriffs.
  Liability for default on execution, §99-19-69.
Speeding.
  Standard state monetary assessment, §99-19-73.
Standard state monetary assessment, §99-19-73.
Traffic violations generally.
  Standard state monetary assessment, §99-19-73.

FIREFIGHTERS AND FIRE DEPARTMENTS.
Crimes targeting first responders.
  Enhanced penalties, §§99-19-301 to 99-19-309.

FIRE MARSHALS.
Arrests.
  Powers, governing provisions, §99-3-7.

FIRING SQUAD.
Death penalty.
  Execution of death sentence, §99-19-51.

FISH AND GAME.
Fines.
  Standard state monetary assessment for violations, §99-19-73.
Standard state monetary assessment for violations, §99-19-73.

FLEEING KILLERS.
Reward for apprehension, §§99-3-35, 99-3-37.

FORFEITURES.
Appearance bond.
  Condition of probation, community control, court ordered supervision.
    Failure to appear, §99-5-39.

FORGERY.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.
Limitation of actions not applicable, §99-1-5.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

FORMS.
Bail and recognizance, §§99-5-1, 99-5-3.
Prisons and prisoners.
  Commitment to penitentiary, §99-19-47.
Probation.
  Reporting form, §99-19-48.
Sentencing.
  Commitment to penitentiary, §99-19-43.

FRAUD.
Assistance program fraud.
  Limitation of actions, §99-1-5.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.
State or federally funded assistance programs.
  Limitation of actions, §99-1-5.
Welfare fraud.
  Limitation of actions, §99-1-5.

FREEDOM OF SPEECH.
Hate crimes, enhanced penalties.
  Freedom of speech and assembly not abridged by provisions of act, §99-19-309.

FUGITIVES.
Limitation on criminal prosecution.
  Inapplicability, §99-1-5.

FUTURES CONTRACTS.
Burden of proof.
  Proof of single violation, §99-17-25.
Commodities exchanges.
  Dealing in futures.
    Duty of officers to arrest, §99-3-25.
Witnesses.
  Compelling testimony of witnesses, §99-17-27.

G

GAMBLING.
Burden of proof.
  Proof of single violation, §99-17-25.
Gamblers.
  Duty of officers to arrest, §99-3-25.
Indictments.
  Sufficiency of charges, §99-7-27.
Witnesses.
  Compelling testimony of witness, §99-17-27.

GAME AND FISH.
Fines.
  Standard state monetary assessment for violations, §99-19-73.
Standard state monetary assessment for violations, §99-19-73.

GAMING.
Indictments.
  Specificity of charges, §99-7-27.

GENDER.
Hate crimes.
  Enhanced penalties, §§99-19-301 to 99-19-309.

GLOBAL POSITIONING SYSTEMS.
Bail in domestic violence cases.
  Condition of bond for defendant, §99-5-38.
Electronic monitoring of sex offenders.
  Condition of probation, §99-19-84.

GOVERNOR.
Death penalty.
  Official state executioner, appointment of, §99-19-53.
Habitual offenders.
  Pardon power unaffected, §99-19-85.

GPS.
Bail in domestic violence cases.
  Condition of bond for defendant, §99-5-38.
Electronic monitoring of sex offenders.
  Condition of probation, §99-19-84.

GRAND JURY.
Compelling attendance of witnesses, §§99-9-23, 99-9-25.
Indictments.
  Concurrence of twelve jurors required, §99-7-11.
Insanity defense.
  Adjudication of accused as insane or person with an intellectual disability, §99-13-5.
Perjury.
  Witness to be bound over for grand jury, §99-3-31.
State grand jury.
  Indictments.
    Venue regarding indictments returned, §99-11-3.

GUILTY PLEAS, §§99-15-24, 99-15-25.
Dismissal of action after entry of plea.
  Successful completion of court-imposed conditions, §99-15-26.
Domestic violence cases.
  Withholding of acceptance pending completion of conditions imposed by court, §99-15-26.
Entry of guilty pleas in vacation, §99-15-25.
Punishment upon legal conviction, §99-19-3.

GUILTY PLEAS —Cont'd
Venue for motion or entry of plea, §99-15-24.

H

HABITUAL OR REPEAT OFFENDERS.
Sentencing guidelines, §§99-19-81 to 99-19-87.
  Death sentence unaffected, §99-19-87.
  Governor's pardoning power unaffected, §99-19-85.
  Life imprisonment, §99-19-83.
  Maximum term of imprisonment, §99-19-81.

HARRISON COUNTY.
Jurisdiction.
  Crimes committed in particular judicial districts, §99-11-37.
Venue.
  Crimes committed in particular judicial districts.
    Transmittal of records on change of venue or removal of trial, §99-11-39.

HATE CRIMES.
Enhanced penalties, §§99-19-301 to 99-19-309.
  Amount penalty may be enhanced, §99-19-307.
  Freedom of speech and assembly not abridged by provisions of act, §99-19-309.
  Notice of enhancement, §99-19-303.
  Penalties subject to enhancement, §99-19-301.
  Required findings for enhanced penalty, §99-19-303.
  Sentencing proceedings, §99-19-305.

HIGHWAY SAFETY PATROL.
Reward for arrest of fleeing killer.
  Authority to receive, §99-3-37.

HINDS COUNTY.
Jurisdiction.
  Crimes committed in particular judicial districts, §99-11-37.
Venue.
  Crimes committed in particular judicial districts.
    Transmittal of records on change of venue or removal of trial, §99-11-39.

HOMICIDE.
Indictments.
  Specificity of charges, §99-7-37.
Manslaughter.
  Indictments.
    Specificity of charges, §99-7-37.
  Lesser included crime of murder and capital murder, §99-19-5.
    Murder indictment sufficient to charge manslaughter, §99-7-37.
  Reward for apprehension of fleeing killer, §§99-3-35, 99-3-37.
Murder.
  Indictment.
    Sufficiency, §99-7-37.
  Lesser included crime of manslaughter, §99-19-5.
    Murder indictment sufficient to charge, §99-7-37.
  Reward for apprehension of fleeing killer, §§99-3-35, 99-3-37.
Reward for apprehension of fleeing killer, §§99-3-35, 99-3-37.

HUMAN TRAFFICKING.
Limitation of actions not applicable, §99-1-5.
Victims.
  Funding of victim service providers.
    Assessment upon person convicted of crime against minor.
      Amount, deposit in fund, §99-19-75.

I

IDENTIFICATION CARDS.
Fraudulent use.
  Enhanced penalties.
    Stolen instrumentalities of identity, crimes committed with, §99-19-401.

IDENTITY THEFT.
Enhanced penalties.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.

IMMUNITY.
Arrests.
  Legal arrests, §99-3-23.
Dueling.
  Compelled testimony against participants, §99-17-23.
Gambling and futures contracts.
  Witness compelled to testify, §99-17-27.

INCOMPETENCY.
Competency to stand trial.
  Insanity defense, §§99-13-1 to 99-13-11.
Insanity defense, §§99-13-1 to 99-13-11.

INDICTMENTS, §§99-7-1 to 99-7-41.
Accused entitled to copy without cost, §§99-7-13, 99-15-28.
Allegations of time, §99-7-5.
Amendments.
  Demurrers, §99-7-21.
  Name of unknown defendant discovered, §99-7-25.
Arrest warrants.
  Immediate issue and service, §99-7-9.
Capital cases.
  Copy of indictment and special venire to be given to defendant, §99-15-27.
  Joint indictments.
    Severance of charges, §99-15-47.
Common law offenses, §99-7-1.
  Offenses not provided for by statute, §99-1-3.
Death penalty.
  Copy of indictment and special venire to be given to defendant, §99-15-27.
Demurrers, §99-7-21.
Dilatory pleas, §§99-7-17, 99-7-19.
Embezzlement of money or evidences of debt, §99-7-31.
Formal words.
  Necessity, §99-7-3.
Gambling or gaming offenses, §99-7-27.
Grand jurors.
  Concurrence of twelve required for finding, §99-7-11.
Homicide, §99-7-37.
Inspection of indictment.
  Authority to limit until arrest made, §99-7-15.
Insufficient description of offense.
  Effect upon bail, §99-5-21.
Intoxicating beverage offenses, §99-7-29.
Joint indictments.
  Severance in felony cases, §99-15-47.
  Severance in misdemeanor cases, §99-15-49.
Larceny of money or evidences of debt, §99-7-31.

INDICTMENTS —Cont'd
Lesser crimes.
  Murder indictments.
    Sufficient to charge manslaughter, §99-7-37.
Libel, §99-7-33.
Lost or destroyed.
  Time limitation on prosecutions.
    Additional year allowed, §99-1-9.
Lottery crimes, §99-7-35.
Manslaughter, §99-7-37.
Motions to quash, §99-7-23.
Multiple charges in single indictment, §99-7-1.
Murder, §99-7-37.
Necessity for formal or technical words, §99-7-3.
Ownership of property vested in entity other than an individual.
  Crimes where ownership must be proven, §99-7-31.
Perjury, §§99-7-39, 99-7-41.
  No variance between sworn and affirmed, §99-17-33.
Pleadings.
  How instruments pleaded, §99-7-7.
Presentment, §99-7-9.
Quashed or abated.
  Time limitation on prosecutions.
    Additional year allowed, §99-1-9.
Secret record book.
  Lost or destroyed indictment.
    Trial on certified copy from book, §99-7-13.
Service upon defendant, §99-7-9.
Statute of limitations.
  Commencement of prosecution, §§99-1-7, 99-1-9.
Statutory offenses, §99-7-1.
Summons and process.
  Issuance of capias or alias for arrest on indictment, §99-9-1.
Technical words.
  Necessity, §99-7-3.
Trial on indictment.
  Trial within 270 days of arraignment, §99-17-1.
Variance between indictment and proof, §§99-17-13, 99-17-15.
Want of perfect venue, §99-7-5.
Warrantless arrest.
  Arrest of defendant on returned indictment without process, §99-3-9.

INDIGENT PERSONS.
Capital defense counsel division.
  Office of state public defender, §§99-18-1 to 99-18-17.
Court-appointed counsel in criminal cases, §99-15-15.
Fines.
  Imprisonment for nonpayment prohibited, §§99-19-20, 99-19-20.1.
Office of state public defender, §§99-18-1 to 99-18-17.
Right to counsel.
  Youth court proceedings.
    Parent or guardian determined by youth court judge to be indigent.
      Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.
Sentencing.
  Imposition of fine, §99-19-20.
    Nonpayment, no automatic incarceration, §99-19-20.1.
State defender.
  Office of state public defender, §§99-18-1 to 99-18-17.
Youth court.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.

INFORMATIONS.
Dilatory pleas.
  Amendment of information, §99-7-19.
Insufficient description of offense.
  Effect upon bail, §99-5-21.

INSANITY.
Defense of insanity, §§99-13-1 to 99-13-11.

INSANITY DEFENSE, §§99-13-1 to 99-13-11.
Acquittal for insanity, §99-13-7.
  Presumption of continuing mental illness and dangerousness, §99-13-7.
Disposition of persons with mental illness or intellectual disability.
  Conservators of the peace, §99-13-3.
Grand jury proceedings.
  Adjudication as insane or person with an intellectual disability.
    Disposition of accused, §99-13-5.
Intellectual disability.
  Acquittal on ground of having, §99-13-9.
    Person with intellectual disability defined, §99-13-1.
Mental examination.
  Felony defendants, §99-13-11.
Presumption of continuing mental illness and dangerousness.
  Acquitted persons, §99-13-7.

INSPECTIONS.
Indictments.
  Authority to limit until arrest made, §99-7-15.

INTERNET.
Court appearance by means of web cam, §99-1-23.

INTERPRETERS.
Criminal cases, §99-17-7.

INVESTIGATIONS.
Criminal procedure.
  Assessment on persons convicted to cover investigative costs, §99-19-77.

INVOLUNTARY MANSLAUGHTER.
Indictments.
  Specificity of charges, §99-7-37.
Reward for apprehension of fleeing killer, §§99-3-35, 99-3-37.

J

JAILS.
Arrest of certified jail officer.
  Officer charged with committing crime while performing duties.
    Procedure requirements prior to issuance of warrant, §99-3-28.
Criminal appeals.
  Detention of defendant pending appeal, §99-19-39.
Safekeeping inmates, §99-3-13.

JOHN DOE ACTIONS.
Indictments.
  Discovery of name of unknown defendant, §99-7-25.

JOINT CRIMINAL DEFENDANTS.
Competency as witness for one another, §99-17-17.
Peremptory challenges, §99-17-5.
Verdicts, §99-19-7.

JURISDICTION.
Arrests.
  Intrastate jurisdiction to apprehend offender, §§99-3-13, 99-3-19.
  Territorial jurisdiction, §99-3-19.
Crimes and offenses.
  Act in one jurisdiction causing death in another, §99-11-21.
  Commission of crime within state by person while out of state, §99-11-25.
  Completion of last act doctrine, §99-11-21.
  Concurrent jurisdiction with Arkansas, §99-11-7.
  Embezzlement, §99-11-11.
  Extent of criminal jurisdiction of state, §99-11-5.
  Kidnapping, §99-11-13.
  Natural parent of illegitimate children.
    Multiple births, §99-11-9.
  Offenses commenced in and consummated out of state, §99-11-17.
  Offenses commenced out of and consummated in state, §99-11-15.
  Offenses committed partly in one county and partly in another, §99-11-19.
  Territorial jurisdiction, §99-11-5.
  Venue for trying criminal cases, §99-11-1.
Embezzlement, §99-11-11.
Harrison county.
  Crimes committed in particular judicial districts, §99-11-37.
Hinds county.
  Crimes committed in particular judicial districts, §99-11-37.
Kidnapping, §99-11-13.
Paternity proceedings.
  Prosecutions for multiple births, §99-11-9.
Stolen property.
  Property stolen in another county, §99-11-23.
  Property stolen in another state, §99-11-23.

JURY AND JURY TRIAL.
Exhibits.
  Papers read into evidence.
    Jurors may carry into jury room, §99-17-37.
Findings of jury, §99-19-5.

JURY AND JURY TRIAL —Cont'd
Instructions to jury.
  Criminal cases, §99-17-35.
  Death penalty cases.
    Statutory jury instructions, §99-19-103.
Lesser included offenses.
  Finding defendant guilty, §99-19-5.

JURY INSTRUCTIONS.
County courts.
  Criminal cases, §99-17-35.
Death penalty cases.
  Statutory jury instructions, §99-19-103.

JUSTICE COURT PROSECUTIONS.
Fines.
  Minimum fine which may be imposed, §99-3-3.

JUSTICE COURTS.
Arrest warrants.
  Issuance, §99-3-21.
Bail and recognizance.
  Alias warrants, §99-5-11.
  Judges.
    Authority to take recognizance or bond, §99-5-11.
Corporations.
  Proceedings before justice court judge, §99-9-9.

JUVENILE CORRECTIONAL FACILITIES.
Adolescent opportunity program.
  Arrest of counselor.
    Charged with committing offense while performing duties.
      Procedure requirements before issuance of arrest warrant, §99-3-28.

JUVENILE DELINQUENTS.
Appointment of counsel for indigents, §99-15-15.

JUVENILE OFFENDERS.
Appointment of counsel for indigents, §99-15-15.
Felon under age sixteen.
  Sentencing, §99-19-15.

K

KIDNAPPING.
Jurisdiction, §99-11-13.
Limitation of actions not applicable, §99-1-5.

KIDNAPPING —Cont'd
Venue, §99-11-13.

L

LARCENY.
Indictments.
  Sufficiency of charges, §99-7-31.
Limitation of actions not applicable, §99-1-5.
Timber.
  Limitations period for criminal prosecution, §99-1-5.

LAW ENFORCEMENT OFFICERS.
Arrest.
  Criminal background check on persons being arrested, §99-3-43.
  Officer charged with committing crime while in performance of duties.
    Procedure requirements prior to issuance of arrest warrant, §99-3-28.
Crimes targeting first responders.
  Enhanced penalties, §§99-19-301 to 99-19-309.
Federal law enforcement officers.
  Authority to make arrest, §§99-3-1, 99-3-2.
Reward for arrest of fleeing killer.
  Authority to receive, §99-3-37.

LEGISLATURE.
Witnesses.
  Crimes affecting legislature.
    Immunity for testimony, §99-17-31.

LESSER INCLUDED OFFENSES.
Jury finding defendant guilty, §99-19-5.
Manslaughter lesser included offense of murder and capital murder, §99-19-5.
Murder indictment.
  Sufficient to charge lesser crime of manslaughter, §99-7-37.

LETHAL INJECTION.
Death penalty, §99-19-51.

LIE DETECTOR TESTS.
Sex offense victims.
  Not to be requested or required of, §99-1-27.

LIFE IMPRISONMENT.
Habitual offenders.
  Sentencing repeat felons, §99-19-83.

LIFE IMPRISONMENT WITHOUT PAROLE.
Sentencing phase of capital cases, §§99-19-101 to 99-19-107.
Unconstitutionality of death penalty, §99-19-107.

LIMITATION OF ACTIONS.
Assistance program fraud, §99-1-5.
Conspiracy, §99-1-5.
Criminal prosecutions.
  Commencement of prosecution, methods, §99-1-7.
  Offenses for which no limitations period applicable, §99-1-5.
  Time periods for specified offenses, §99-1-5.
Timber larceny, §99-1-5.
Welfare fraud, §99-1-5.

LOCAL GOVERNMENTS.
Authority to offer, §99-3-39.

LOTTERIES.
Exemption from prosecution.
  Ticket purchaser who testifies against seller, §99-17-29.
Indictments.
  Specificity of charges, §99-7-35.
Witnesses.
  Purchaser of ticket compelled to testify against seller, §99-17-29.

M

MANSLAUGHTER.
Indictments.
  Specificity of charges, §99-7-37.
Lesser included crime of murder and capital murder, §99-19-5.
  Murder indictment sufficient to charge manslaughter, §99-7-37.
Limitation of actions not applicable, §99-1-5.
Reward for apprehension of fleeing killer, §§99-3-35, 99-3-37.

MEDICAID FRAUD.
Limitation of actions, §99-1-5.

MENTAL HEALTH.
Death penalty.
  Suspension of sentence where convict insane, §99-19-57.
Insanity defense, §§99-13-1 to 99-13-11.

MENTALLY DISABLED CRIMINAL DEFENDANTS.
Insanity defense, §§99-13-1 to 99-13-11.

MENTALLY INCOMPETENT.
Insanity defense, §§99-13-1 to 99-13-11.

MINISTERS.
Death penalty executions.
  Witness, §99-19-55.

MISDEMEANORS.
Aged persons.
  Crimes committed against.
    Enhanced penalties, §§99-19-351 to 99-19-357.
Bail.
  Release on own recognizance, §99-5-11.
Fines.
  Standard state monetary assessment, §99-19-73.
Sentencing.
  Suspended sentences in misdemeanor cases, §99-19-25.
Standard state monetary assessment for violations, §99-19-73.

MOTIONS.
Indictments.
  Motions to quash, §99-7-23.

MOTOR VEHICLE INSURANCE.
Violations, standard state monetary assessment, §99-19-73.

MOTOR VEHICLES.
Careless driving.
  Standard state monetary assessment, §99-19-73.
Reckless driving.
  Standard state monetary assessment, §99-19-73.

MURDER.
Indictment.
  Sufficiency, §99-7-37.
Lesser included crime of manslaughter, §99-19-5.
  Murder indictment sufficient to charge, §99-7-37.
Limitation of actions not applicable, §99-1-5.
Reward for apprehension of fleeing killer, §§99-3-35, 99-3-37.

N

NATIONAL ORIGIN.
Hate crimes.
  Enhanced penalties, §§99-19-301 to 99-19-309.

NEW TRIAL.
Court-directed terms, §99-17-47.
Criminal cases.
  Grant or refusal assignable for error, §99-17-49.
  Limitation on number, §99-17-47.
  Terms directed by court, §99-17-47.
Number allowed, §99-17-47.

NITROGEN HYPOXIA.
Death penalty.
  Execution of death sentence, §99-19-51.

NOTICE.
Bail.
  Misleading court about proper delivery of writ or judgment.
    Bail bond issued containing misleading information, notice of, §99-5-1.
Death penalty.
  Date for execution of death sentence, §99-19-55.
Sentencing.
  Hate crimes.
    Enhanced penalties, §99-19-303.
Victim impact statements.
  Sentencing hearing, §99-19-161.

NURSES.
Death penalty.
  Execution of death sentence.
    Not construed as practicing medicine or nursing, §99-19-53.

O

OBJECTIONS.
Indictments.
  Motions to quash, §99-7-23.
Jury instructions.
  Criminal cases, §99-17-35.

OBSCENITY AND PORNOGRAPHY.
Child pornography.
  Prohibition on reproduction of evidentiary materials during discovery, §99-1-29.

OFFICE OF STATE PUBLIC DEFENDER, §§99-18-1 to 99-18-17.

ORDERS.
Indictments.
  Trial on indictment.
    Variance between indictment and proof.
      Order for amendment, §99-17-15.

P

PARDONS.
Annulment of conditional pardon, §99-19-29.
Dentists.
  Criminal unfitness to practice medicine.
    Removal of disability by pardon, §99-19-35.
Habitual offenders.
  Governor's pardon power unaffected, §99-19-85.
Physicians and surgeons.
  Criminal unfitness to practice medicine.
    Removal of disability by pardon, §99-19-35.
Public officers and employees.
  Criminal unfitness to hold office.
    Removal of disability by pardon, §99-19-35.

PAROLE.
Felony conviction while on parole.
  Commencement of imprisonment for parole violation, §99-19-21.
Habitual offenders.
  Ineligibility for parole, §99-19-83.

PARTIES.
Indictments.
  Discovery of name of unknown defendant, §99-7-25.

PATERNITY PROCEEDINGS.
Crimes and offenses.
  Second or subsequent illegitimate child, §99-11-9.
Jurisdiction over actions.
  Multiple births of illegitimate children, §99-11-9.
Multiple births of illegitimate children.
  Criminal jurisdiction, §99-11-9.
Venue of actions.
  Multiple births of illegitimate children, §99-11-9.

PEACE BONDS.
Bail and recognizance, §§99-5-1 to 99-5-39.

PEREMPTORY CHALLENGES.
Criminal cases.
  Joint defendants, §99-17-5.
  Number allowed, §99-17-3.

PERJURY.
Arrests.
  Court detention of documents, §99-3-33.
  Immediate arrest, §99-3-29.
  Witness bound over for grand jury and trial, §99-3-31.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Elections.
  Conviction of certain crimes as bar to public office, §99-19-35.
Grand jury witnesses, §99-3-31.
Indictments.
  No variance between sworn and affirmed, §99-17-33.
  Specificity of charges, §§99-7-39, 99-7-41.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.
Record of proceedings.
  Court detention of documents, §99-3-33.
Subornation of perjury.
  Indictments.
    Specificity of charges, §99-7-41.
Witnesses bound over for trial, §99-3-31.

PHARMACISTS AND PHARMACIES.
Death penalty.
  Dispensing of drugs without valid prescription to state executioner, §99-19-53.
State executioners.
  Dispensing of drugs without valid prescription, §99-19-53.

PHYSICIANS AND SURGEONS.
Arson.
  Conviction bar to practice of medicine, §99-19-35.
Bigamy.
  Conviction bar to practice of medicine, §99-19-35.

PHYSICIANS AND SURGEONS —Cont'd

Bribery.
  Conviction bar to practice of medicine, §99-19-35.
Burglary.
  Conviction bar to practice of medicine, §99-19-35.
Capital punishment.
  Execution of death sentence.
    Attending physician or physicians, §§99-19-53, 99-19-55.
Death penalty.
  Execution of death sentence.
    Not construed as practicing medicine, §99-19-53.
Embezzlement.
  Conviction bar to practice of medicine, §99-19-35.
False pretenses, obtain money or goods under.
  Conviction bar to practice of medicine, §99-19-35.
Forgery.
  Conviction bar to practice of medicine, §99-19-35.
Pardons.
  Criminal unfitness to practice medicine.
    Removal of disability by pardon, §99-19-35.
Perjury.
  Conviction bar to practice of medicine, §99-19-35.
Theft.
  Conviction bar to practice of medicine, §99-19-35.

PLEADINGS.
Acquittals.
  Form defects in pleadings.
    Evidentiary effect, §99-11-35.
Indictments.
  How instruments pleaded, §§99-7-3, 99-7-7.
Perjury.
  No variance between sworn and affirmed in indictment charges, §99-17-33.

PLEAS, §§99-15-23 to 99-15-25.
Defendant stands mute, §99-15-23.
Indictments.
  Dilatory pleas, §§99-7-17, 99-7-19.
Mute defendant, §99-15-23.

POLICE.
Crimes targeting first responders.
  Enhanced penalties, §§99-19-301 to 99-19-309.
Reward for apprehension of fleeing killer, §99-3-37.

POLYGRAPH EXAMS.
Victims of sex offenses.
  Lie detector tests not to be requested or required, §99-1-27.

POST-CONVICTION PROCEEDINGS.
Closed circuit television.
  Persons in custody or confinement, §99-1-23.
Costs.
  Offender in custody.
    Case not heard during term, §99-19-42.
Offender in custody of department of corrections.
  Time for hearing, §99-19-43.

PREGNANCY.
Death row inmates.
  Suspension of death sentence, §99-19-57.

PRESENCE OF DEFENDANT AT TRIAL.
Waiver, §99-17-9.

PRESENTMENT.
Indictments, §99-7-9.

PRESUMPTIONS.
Insanity, acquittal on grounds of.
  Presumption of continuing mental illness and dangerousness, §99-13-7.

PRETRIAL DETENTION.
Dangerously injuring wounded party, §99-5-33.

PRETRIAL INTERVENTION PROGRAM, §§99-15-101 to 99-15-127.
Admission into program.
  Conditions for eligibility, §99-15-109.
  Ineligibility, §99-15-107.
  Offenders' written reports.
    Disclosure, §99-15-119.
  Recommendations of victim and law enforcement agency, §99-15-113.
  Required information from offender, §99-15-111.
  Waivers and agreements required of offender, §99-15-115.

PRETRIAL INTERVENTION PROGRAM —Cont'd
Agreement between district attorney and offender.
  Approval by court, §99-15-117.
Application to program, §99-15-105.
Citation of act, §99-15-101.
Completion of program.
  Disposition of charges, §99-15-123.
  Expungement of records, §99-15-123.
  Restitution required, §99-15-121.
Definitions, §99-15-103.
District attorneys.
  Role of, §99-15-105.
Division of community services.
  Interagency support, §99-15-127.
Eligibility for intervention, §99-15-109.
  Ineligibility, §99-15-107.
Establishment of program, §99-15-105.
Expungement, §§99-15-59, 99-15-123.
Ineligibility for program, §99-15-107.
Interagency cooperation, §99-15-127.
Referral to program in exchange for confession or waiver of right, §99-15-125.
Restitution, §§99-15-115, 99-15-121.
Title of act, §99-15-101.
Violation of program agreement by offender, §99-15-123.
Waiver of rights.
  Condition for acceptance, §99-15-115.
  Inducement for referral, §99-15-125.

PRETRIAL PROCEEDINGS, §§99-15-1 to 99-15-59.
Appointment of counsel for indigents, §§99-15-17 to 99-15-21.
Change of venue, §§99-15-35 to 99-15-45.
Closed circuit television.
  Persons in custody or confinement, §99-1-23.
Conservators of the peace, §§99-15-1 to 99-15-11.
Continuances, §§99-15-29 to 99-15-33.
Dismissal of charges.
  Completion of court-imposed conditions, §§99-15-26, 99-15-57.
  Felony trial where accused only guilty of misdemeanor, §99-15-55.
  Petty misdemeanor charge upon satisfaction of injured party, §99-15-51.

PRETRIAL PROCEEDINGS —Cont'd
Expungement of misdemeanor charges, §99-15-59.
Indictments.
  Accused entitled to copy, §§99-15-27, 99-15-28.
  Joint indictments, §§99-15-47, 99-15-49.
Joint indictments, §§99-15-47, 99-15-49.
Pleas, §§99-15-23 to 99-15-25.
Venue.
  Change of venue, §§99-15-35 to 99-15-45.
Victim impact statements, §§99-19-151 to 99-19-161.

PRISONS AND PRISONERS.
Closed circuit television.
  Court appearances, §99-1-23.
Commitment to penitentiary.
  Form, §99-19-47.
Court appearances.
  Closed circuit television, §99-1-23.

PRISON TERMS.
Capital cases.
  Life imprisonment without parole, §§99-19-101 to 99-19-107.
Death penalty cases.
  Life imprisonment without parole, §§99-19-101 to 99-19-107.
Futures contracts.
  Refusal of witness to testify after grant of immunity, §99-17-27.
Gambling.
  Refusal of witness to testify after grant of immunity, §99-17-27.
Habitual offenders.
  Life imprisonment, §99-19-83.
  Maximum term of imprisonment, §99-19-81.
Imposition of sentence of imprisonment, §§99-19-21 to 99-19-29.
Juvenile offenders.
  Felon under age sixteen, §99-19-15.
Life imprisonment without parole.
  Sentencing phase of capital cases, §§99-19-101 to 99-19-107.
Nonpayment of fines.
  No automatic incarceration, §99-19-20.1.
  Who may be imprisoned, §99-19-20.
Penalty not fixed by statute, §99-19-31.

PRISON TERMS —Cont'd
Sentencing generally, §§99-19-1 to 99-19-357.

PROBABLE CAUSE.
Arrest.
  Misdemeanor domestic violence offense, §99-3-7.
Searches and seizures.
  Payment of court costs for issuance without reasonable cause, §99-1-11.

PROBATION.
Appearance bond as condition, §99-5-39.
  Forfeiture, failure to appear, §99-5-39.
Conditions.
  Appearance bond, §99-5-39.
  Electronic monitoring of sex offenders, §99-19-84.
Electronic monitoring as condition of probation.
  Sex offenders, §99-19-84.
Felony committed while on probation.
  Commencement of imprisonment for probation violation, §99-19-21.
Fines.
  Payment as condition of probation, §99-19-20.
Habitual offenders.
  Ineligibility for probation, §99-19-83.
Reporting form, §99-19-48.
Sex offenders.
  Electronic monitoring as condition of probation, §99-19-84.
Transmittal of probation order, §99-19-45.

PROCESS.
Summons and process, §§99-9-1 to 99-9-37.

PROSTITUTION.
Promoting prostitution.
  Limitation of actions not applicable, §99-1-5.

PROTECTIVE ORDERS.
Criminal sexual assault protection order.
  Warrantless arrest permitted for violation, §99-3-7.

PROTECTIVE ORDERS —Cont'd
Domestic violence.
  Bail and recognizance.
    Existence of domestic abuse protection order taken into consideration when fixing bail, §99-5-11.

PUBLIC DEFENDERS.
Office of state public defender, §§99-18-1 to 99-18-17.
  Capital defense counsel division.
    Active members of state bar.
      Requirement, §99-18-3.
    Administration, budget, finances.
      Responsibility for, §99-18-1.
    Attorneys and other staff.
      Appointment, §99-18-3.
    Capital counsel defense fund, §99-18-17.
    Compensation of attorneys, §99-18-9.
    Conflicts of interest, §99-18-17.
    Created within office, §99-18-3.
    Director/capital defender.
      Appointment, §99-18-3.
      Compensation, §99-18-9.
      Docket of death eligible cases in state, §99-18-15.
      Qualifications, §99-18-3.
      Removal, §99-18-3.
      Roster of death penalty cases in state, §99-18-15.
    Docket of death eligible cases in state, §99-18-15.
    Duties, §99-18-7.
    Full time devotion to duties of division.
      Attorneys appointed to serve, §99-18-7.
    Hours of operation, §99-18-11.
    Lobbying activities prohibited, §99-18-7.
    Office hours, §99-18-11.
    Practice of law, engaging in other litigation.
      Prohibition, §99-18-7.
    Private counsel.
      Employment, fees and expenses, payment, §99-18-17.
    Purpose, §99-18-5.
    Representing indigents under indictment for death penalty.
      Limiting duties to, §99-18-7.

PUBLIC DEFENDERS —Cont'd
Office of state public defender —Cont'd
  Capital defense counsel division —Cont'd
    Representing indigents under indictment for death penalty —Cont'd
      Purpose, §99-18-5.
    Roster of death penalty cases in state, §99-18-15.
    Termination from employment, §99-18-7.
    Termination of representation.
      Completion of trial or direct appeal, §99-18-7.
    Two or more defendants represented.
      Conflicts of interest, §99-18-17.
  Deposit of fees and charges, §99-18-1.
  Disbursement of salaries and employment benefits.
    State defender, §99-18-13.
  Establishment of salaries and expenses.
    State defender, §99-18-13.
  Expenses of office defrayed by appropriation, §99-18-1.
  Funding, §99-18-1.
  Indigent appeals division.
    Administration, budget, finances.
      Responsibility for, §99-18-1.
  Office created, §99-18-1.
  Office supplies and equipment.
    State defender, §99-18-13.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.
  Public defender training division.
    Administration, budget, finances.
      Responsibility for, §99-18-1.
  Rent or lease of office space.
    State defender, §99-18-13.
  State defender.
    Appointment, §99-18-1.
    Coordination of collection of statistical data, §99-18-1.
    Powers and duties, §99-18-13.
    Qualifications, §99-18-1.
    Removal, §99-18-1.
    Reports, §99-18-1.
    Salary, §99-18-1.
    Simultaneous service of director of division, §99-18-1.

PUBLIC DEFENDERS —Cont'd
Office of state public defender —Cont'd
  State defender —Cont'd
    Term, §99-18-1.
  Transfer of funds.
    Authority, §99-18-1.

PUBLIC FUNDS.
Capital defense counsel fund, §99-18-17.

PUBLIC OFFICERS AND EMPLOYEES.
Arson.
  Conviction bar to holding office, §99-19-35.
Bigamy.
  Conviction bar to holding office, §99-19-35.
Bribery.
  Conviction bar to holding office, §99-19-35.
Burglary.
  Conviction bar to holding office, §99-19-35.
Embezzlement.
  Conviction bar to holding office, §99-19-35.
Expungement of records.
  Not available for convictions involving official duties, §99-19-71.
False pretenses, obtaining money or goods under.
  Conviction bar to holding office, §99-19-35.
Forgery.
  Conviction bar to holding office, §99-19-35.
Office of state public defender, §§99-18-1 to 99-18-17.
Perjury.
  Conviction bar to holding office, §99-19-35.
State defender.
  Office of state public defender, §§99-18-1 to 99-18-17.
Theft.
  Conviction bar to holding office, §99-19-35.

R

RABBIS.
Death penalty executions.
  Witness, §99-19-55.

RACIALLY-MOTIVATED CRIMES.
Enhanced penalties, §§99-19-301 to 99-19-309.

RAPE.
Children's trust fund.
  Assessment upon person convicted of rape against minor.
    Amount, deposit in fund, §99-19-75.
Limitation of actions not applicable, §99-1-5.
Victims of human trafficking and commercial sexual exploitation fund.
  Assessment upon person convicted of rape against minor.
    Amount, deposit in fund, §99-19-75.

RECKLESS DRIVING.
Careless driving.
  Standard state monetary assessment, §99-19-73.
Standard state monetary assessment, §99-19-73.

RECORD OF PROCEEDINGS.
Guilty pleas.
  Entry of guilty pleas in vacation, §99-15-25.
Indictments.
  Entry on minutes of court, §99-7-9.
Jury instructions.
  Criminal cases.
    Record on appeal, §99-17-35.
Perjury.
  Court detention of documents, §99-3-33.

REFUNDS.
Standard state monetary assessment for violations, §99-19-73.

RELIGION.
Hate crimes.
  Enhanced penalties, §§99-19-301 to 99-19-309.
Vandalism of places of worship.
  Hate crimes, enhanced penalties, §§99-19-301 to 99-19-309.

RESTITUTION.
Dismissal of criminal actions, §§99-15-26, 99-15-51, 99-15-57.
Pretrial intervention program.
  Condition of acceptance and completion of program, §§99-15-115, 99-15-121.

RESTORATION OF RIGHT OF SUFFRAGE.
World War veterans, §99-19-37.

REWARDS.
Apprehension of fleeing killer, §§99-3-35, 99-3-37.

RIGHT TO COUNSEL.
Indigent persons.
  Youth court proceeding.
    Parent or guardian determined by youth court judge to be indigent.
      Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.
Youth court proceedings.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.

ROBBERY.
Limitation of actions not applicable, §99-1-5.

S

SALARIES.
State public defender, §99-18-1.

SCIENTIFIC EVIDENCE.
AIDS.
  Sex offenders, testing, §§99-19-201, 99-19-203.
    Sex crimes against minors, persons arrested for.
      HIV and AIDS testing, §99-3-41.

SCIRE FACIAS.
Bail.
  Notice to surety of forfeiture of bond by writ, §99-5-25.

SEARCH WARRANTS.
Costs in criminal prosecutions, §99-1-11.
Stolen property.
  Power of conservators of the peace to issue, §99-15-11.

SELF-INCRIMINATION.
Dueling.
  Compelling participants to testify against another, §99-17-23.
Gambling and futures contracts.
  Compelling witness testimony, §99-17-27.
Legislature.
  Denial of privilege for offenses affecting legislature, §99-17-31.

SELF-INCRIMINATION —Cont'd
Lotteries.
  Purchaser of ticket compelled to testify against seller, §99-17-29.

SENIOR CITIZENS.
Crimes committed against.
  Enhanced penalties, §§99-19-351 to 99-19-357.

SENTENCING, §§99-19-1 to 99-19-357.
AIDS and HIV.
  Testing for sexual offenders, §§99-19-201, 99-19-203.
Appearance bond.
  Probation, community control, court ordered supervision, other order to produce defendant, §99-5-39.
Capital murder.
  Death penalty, §§99-19-51 to 99-19-57, 99-19-101 to 99-19-107.
  Life imprisonment without parole, §§99-19-101 to 99-19-107.
Closed circuit television.
  Persons in custody or confinement, §99-1-23.
Commitment to penitentiary.
  Duty of clerks of circuit court, §99-19-43.
  Duty of judge, §99-19-43.
  Form, §99-19-43.
Concurrent term.
  Judicial discretion, §99-19-21.
Consecutive term.
  Judicial discretion, §99-19-21.
Death penalty cases, §§99-19-51 to 99-19-57, 99-19-101 to 99-19-107.
Delayed sentencing.
  Dismissal of action after entry of plea of guilty.
    Successful completion of court-imposed conditions, §99-15-26.
Earned-release.
  Supervision.
    Felony committed while on supervision.
      Commencement of imprisonment for violation, §99-19-21.
Embezzlement.
  Public funds.
    Mandatory minimum sentence, §99-19-18.
Enhanced penalties.
  Aged persons, crimes committed against, §§99-19-351 to 99-19-357.
    Amount of enhancement, §99-19-357.

SENTENCING —Cont'd
Enhanced penalties —Cont'd
  Aged persons, crimes committed against —Cont'd
    Notice of enhancement, §99-19-353.
    Penalties subject to enhancement, §99-19-351.
    Required findings, §99-19-355.
    Sentencing proceedings, §99-19-355.
  Hate crimes, §§99-19-301 to 99-19-309.
  Stolen instrumentalities of identity, crimes committed with, §99-19-401.
Enhanced penalties for hate crimes, §§99-19-301 to 99-19-309.
Futures contracts.
  Refusal of witness to testify after grant of immunity, §99-17-27.
Gambling.
  Refusal of witness to testify after grant of immunity, §99-17-27.
Guilty pleas.
  Entry of guilty pleas in vacation, §99-15-25.
Habitual offenders, §§99-19-81 to 99-19-87.
Hate crimes.
  Enhanced penalties, §§99-19-301 to 99-19-309.
Imposition of modified milder penalty, §99-19-33.
Indictments.
  Multiple offenses charged in single indictment, §99-7-2.
Indigent defendants, §99-19-20.
  Nonpayment, no automatic incarceration, §99-19-20.1.
Juvenile offenders.
  Felon under age sixteen, §99-19-15.
Legal conviction requirement, §99-19-3.
Lesser included offense.
  Findings of jury, §99-19-5.
Milder punishment.
  Imposition of modified milder penalty, §99-19-33.
Mississippi sentencing disparity task force, §99-19-13.
New laws.
  No retroactive effect, §99-19-1.
Offenses punishable by imprisonment for more than one year.
  Fine not fixed by statute.
    Additional fines and assessments authorized, §99-19-32.

SENTENCING —Cont'd
Penalty not fixed by statute, §99-19-31.
Post-release supervision.
  Felony committed while on supervision.
    Commencement of imprisonment for violation, §99-19-21.
Pre-trial or pre-appeal confinement.
  Credit for time served, §99-19-23.
Prison terms, §§99-19-21 to 99-19-29.
  Consecutive or concurrent at discretion of court, §99-19-21.
  Credit for pre-trial or pre-appeal confinement, §99-19-23.
  Felony committed while on parole, probation, etc., §99-19-21.
  Suspended sentences in misdemeanor cases, §99-19-25.
  Vacation of suspended sentence, §99-19-29.
Prospective application of new laws, §99-19-1.
Public funds unlawfully taken.
  Mandatory minimum sentence, §99-19-18.
Sex offenders.
  AIDS and HIV testing, §§99-19-201, 99-19-203.
Suspended sentences.
  Felony committed while on suspended sentence.
    Commencement of imprisonment for violation, §99-19-21.
  Misdemeanor cases, §99-19-25.
  Restoration of right of suffrage to World War veterans.
    Inapplicability of provision, §99-19-37.
  Vacation of suspended sentence.
    Violation of terms, §§99-19-27, 99-19-29.
Task force on sentencing disparity, §99-19-13.
Trafficking in controlled substances.
  Dismissal of action on successful completion of court-imposed conditions, exceptions for certain offenses, §99-15-26.
  Intervention program ineligibility, §99-15-107.
Victim impact statements, §§99-19-151 to 99-19-161.

SERVICE OF NOTICE, PROCESS AND OTHER PAPERS.
Bail.
  Forfeiture of bond.
    Final judgment served on surety, §99-5-25.
Compelling attendance of witnesses in criminal cases.
  Service of subpoena, §99-9-17.
Compelling out-of-state witnesses in criminal cases.
  Exemption from service of process, §99-9-35.

SEVERANCE OF CHARGES.
Death penalty cases.
  Joint indictments, §99-15-47.
Joint indictments, §§99-15-47, 99-15-49.

SEX OFFENDER REGISTRATION AND NOTIFICATION.
Electronic monitoring of sex offenders.
  Condition of probation, §99-19-84.

SEX OFFENDERS.
Electronic monitoring as condition of probation, §99-19-84.
HIV and AIDS testing, §§99-19-201, 99-19-203.
  Sex crimes against minors, persons arrested for.
    HIV and AIDS testing, §99-3-41.
Probation.
  Electronic monitoring as condition of probation, §99-19-84.

SEX OFFENSES.
Children, sex crimes against.
  HIV and AIDS testing of persons arrested, §99-3-41.

SHERIFFS.
Bail and recognizance, §§99-5-15 to 99-5-19.
Fines.
  Escape of inmate upon failure to levy, §99-19-67.
  Liability for default on execution, §99-19-69.
Reward for apprehension of fleeing killer.
  Authority to receive, §99-3-37.

SIGNATURES.
Bills of exceptions.
  Criminal cases, §§99-17-39 to 99-17-45.

SPEED LIMITS.
Exceeding speed limit.
  Standard state monetary assessment, §99-19-73.
Speeding.
  Standard state monetary assessment, §99-19-73.
Violations.
  Standard state monetary assessment, §99-19-73.

STANDARD STATE MONETARY ASSESSMENT.
Certain violation, misdemeanors and felonies, §99-19-73.

STATE DEFENDER.
Office of state public defender, §§99-18-1 to 99-18-17.

STATE PUBLIC DEFENDER.
Office of state public defender, §§99-18-1 to 99-18-17.

STATUTE OF FRAUDS.
Bail and recognizance.
  Revocation of fidelity or surety, §99-5-7.

STATUTE OF LIMITATIONS.
Assistance program fraud, §99-1-5.
Conspiracy, §99-1-5.
Criminal prosecutions.
  Commencement of prosecution, methods, §99-1-7.
  Offenses for which no limitations period applicable, §99-1-5.
  Time periods for specified offenses, §99-1-5.
Timber larceny, §99-1-5.
Welfare fraud, §99-1-5.

STOLEN PROPERTY.
Search warrants.
  Power of conservators of the peace to issue, §99-15-11.

SUBORNATION OF PERJURY.
Indictments.
  Specificity of charges, §99-7-41.

SUBPOENAS.
Conservators of the peace.
  Power to compel testimony, §99-15-9.
Witnesses.
  Compelling attendance of witnesses in criminal cases, §§99-9-11 to 99-9-17.

SUFFRAGE.
Restoration of right of suffrage.
  World War veterans, §99-19-37.

SUMMONS, §§99-9-1 to 99-9-37.
Criminal cases.
  Compelling attendance of witnesses.
    Generally, §§99-9-11 to 99-9-35.
  Out-of-state witnesses, §§99-9-27 to 99-9-37.
Indictments.
  Copy to be served on defendant, §99-7-9.
  Issuance of capias or alias for arrest on indictment, §99-9-1.
Service of summons.
  Indictments, §99-7-9.

SUPPLEMENTAL NUTRITIONAL ASSISTANCE PROGRAM (SNAP).
Fraud.
  Limitation of actions, §99-1-5.

SUPREME COURT OF MISSISSIPPI.
Criminal appeals to supreme court.
  Delivery to county where supreme court held, §99-19-41.

SUSPENDED SENTENCE.
Felony committed while on suspended sentence, §99-19-21.
Misdemeanor cases, §99-19-25.
Restoration of right of suffrage to World War veterans, applicability, §99-19-37.
Vacation of suspended sentence, §§99-19-27, 99-19-29.

T

TEACHERS.
Arrests.
  Procedural requirements for arrest warrants, §99-3-28.

TERMINATION OF PARENTAL RIGHTS.
Youth court proceedings.
  Public defender representation of parent determined to be indigent, §99-18-13.

THEFT.
Dentists.
  Disqualification to practice medicine, §99-19-35.
Physicians and surgeons.
  Disqualification to practice medicine, §99-19-35.
Public officers and employees.
  Disqualification to hold office, §99-19-35.

TIME.
Arrests, §99-3-3.
Bail.
  Scire facias.
    Notice to surety of forfeiture of bond by writ, §99-5-25.
Death penalty.
  Execution of death sentence, §99-19-55.

TRAFFICKING IN CONTROLLED SUBSTANCES.
Dismissal of action on successful completion of court-imposed conditions, exceptions for certain offenses, §99-15-26.
Intervention program ineligibility, §99-15-107.

TRAFFIC REGULATIONS-RULES OF THE ROAD.
Fines.
  Standard state monetary assessment, §99-19-73.
Standard state monetary assessment for violations, §99-19-73.

TRAFFIC VIOLATIONS AND PROCEDURE.
Careless driving.
  Standard state monetary assessment, §99-19-73.
Fines.
  Standard state monetary assessment, §99-19-73.
Reckless driving.
  Standard state monetary assessment, §99-19-73.

TRAMPS.
Citizens' arrest, §99-3-27.

TREES AND TIMBER.
Larceny of timber.
  Limitations period for criminal prosecution, §99-1-5.
Stealing timber.
  Limitations period for criminal prosecution, §99-1-5.

TRIAL.
Absence of accused, §99-17-9.
Argument of counsel.
  Number of attorneys permitted to argue one side, §99-17-11.
Felony prosecution.
  Accused only guilty of misdemeanor, §99-15-55.

TRIAL —Cont'd
Indictments.
  Multiple offenses charged in single indictment, §99-7-2.
  Secret record book of indictments.
    Trial by accused on copy from record book, §99-7-13.
Peremptory challenges.
  Criminal cases, §§99-17-3, 99-17-5.
Perjury.
  Witness to be bound over for trial, §99-3-31.
Presence of criminal defendant at trial.
  Waiver, §99-17-9.
Separate trials for joint defendants.
  Competency of defendants as witnesses for one another, §99-17-17.

U

UNCLAIMED DEAD BODIES.
Death penalty.
  Sole charge of burial of unclaimed body, §99-19-55.

UNIVERSITY OF MISSISSIPPI.
Executed death row inmates.
  Donation of unclaimed body, §99-19-55.

UNKNOWN PARTIES.
Indictments.
  Discovery of name of unknown defendant, §99-7-25.

UNWED PREGNANCY.
Natural parents of illegitimate children.
  Multiple births.
    Criminal prosecution, §99-11-9.

V

VENUE.
Change of venue.
  Criminal cases, §§99-15-35 to 99-15-45.
    Capital cases, §99-15-43.
    Correcting errors in record, §99-15-41.
    Costs.
      Paid by county from which venue transferred, §99-15-45.
    Grounds, §99-15-35.

VENUE —Cont'd
Change of venue —Cont'd
  Criminal cases —Cont'd
    Necessity, §99-15-29.
    Specific objections to defects in transcript required, §99-15-39.
    Transfer of records to removal court, §99-15-37.
    Trial of defendant on copy of indictment, §99-15-39.
  Grounds.
    Criminal cases, §99-15-35.
Criminal cases, §§99-11-1, 99-11-3.
  Act in one jurisdiction causing death in another, §99-11-27.
  Change of venue, §§99-15-35 to 99-15-45.
  Commission of crime within state by person while out of state, §99-11-25.
  Embezzlement, §99-11-11.
  Kidnapping, §99-11-13.
  Local jurisdiction, §99-11-3.
  Offenses commenced in and consummated out of state, §99-11-17.
  Offenses commenced out of and consummated in state, §99-11-15.
  Offenses committed partly in one county and partly in another, §99-11-19.
  Paternity proceedings.
    Natural parents of illegitimate children.
      Multiple births, §99-11-9.
Embezzlement, §99-11-11.
Harrison county.
  Crimes committed in particular judicial districts.
    Transmittal of records on change of venue or removal of trial, §99-11-39.
Hinds county.
  Crimes committed in particular judicial districts.
    Transmittal of records on change of venue or removal of trial, §99-11-39.
Indictments.
  State grand jury, §99-11-3.
  Want of perfect venue, §99-7-3.
Kidnapping, §99-11-13.
Paternity proceedings.
  Natural parent of illegitimate children.
    Multiple births, §99-11-9.

VENUE —Cont'd
State grand jury.
  Indictments returned by grand jury, §99-11-3.
Stolen property.
  Property stolen in another county, §99-11-23.
  Property stolen in another state, §99-11-23.

VERDICTS.
Arrest or reversal for want of form.
  No special form required, §99-19-9.
Criminal cases.
  Defective or informal verdict, §99-19-11.
  Form of verdict, §99-19-9.
  Joint defendants, §99-19-7.
  Reformation of informal or defective verdict, §99-19-11.
Indictments.
  Multiple offenses charged in single indictment, §99-7-2.

VETERANS.
Restoration of right of suffrage.
  World War veterans, §99-19-37.

VICTIM IMPACT STATEMENTS, §§99-19-151 to 99-19-161.

VICTIMS OF CRIME.
Criminal charges.
  Informing victim as to status of charge, §99-7-9.
Impact statements, §§99-19-151 to 99-19-161.
  Citation of act, §99-19-151.
  Cooperation of victim not mandatory, §99-19-159.
  Copies to counsel, §99-19-159.
  Court-ordered statements, §99-19-157.
  Definitions, §99-19-155.
  Disclosure to defense and prosecution, §99-19-159.
  Legislative intent, §99-19-153.
  Multiple victims.
    Representative statements, §99-19-157.
  Preparation in felony cases, §99-19-157.
  Public policy, §99-19-153.
  Sentencing hearing.
    Notice to victim, §99-19-161.
    Statement as factor in sentencing, §99-19-159.
  Short title, §99-19-151.
  Use in sentencing, §99-19-159.

VICTIMS OF CRIME —Cont'd
Impact statements —Cont'd
  Voluntary statements, §99-19-157.
Indictments.
  Informing victim as to status of charge, §99-7-9.
Lie detector tests.
  Not requested or required of sex offense victims, §99-1-27.
Restitution.
  Dismissal of action upon successful completion of restitution, §§99-15-26, 99-15-51, 99-15-57.
  Pretrial intervention program.
    Condition of acceptance and completion of program, §§99-15-115, 99-15-121.
Sex offense victims.
  Lie detector tests not to be requested or required of victims, §99-1-27.

VOLUNTARY MANSLAUGHTER.
Indictments.
  Specificity of charges, §99-7-37.

VOTING RIGHTS.
World War veterans, §99-19-37.

VULNERABLE PERSONS.
Abuse, neglect, exploitation.
  Limitation of actions for criminal prosecution, §99-1-5.

W

WARRANTLESS ARREST.
Bucket-shop owners, §99-3-25.
Domestic violence.
  Misdemeanor or felony which is act of domestic violence, §99-3-7.
  Violation of bond conditions, §99-5-37.
Escaped offenders.
  Capture.
    Pursuing and retaking without warrant, §99-3-15.
Futures dealers, §99-3-25.
Gamblers, §99-3-25.
Generally, §99-3-7.
Indictments.
  Arrest of defendant on returned indictment without process, §99-3-9.
Perjurers, §99-3-39.
Tramps, §99-3-27.

WARRANTS.
Death penalty.
  Warrant for execution of death sentence, §99-19-55.

WEB CAM.
Court appearance by means of web cam, §99-1-23.

WITNESSES.
Compelling attendance, §§99-9-11 to 99-9-25.
  Arrest for non-appearing subpoenaed witness, §99-9-19.
  Discharge of witness, §99-9-21.
  Grand jury witnesses, §§99-9-23, 99-9-25.
  Out-of-state witnesses, §§99-9-27 to 99-9-37.
    Citation of act, §99-9-27.
    Construction of act, §99-9-37.
    Definitions, §99-9-29.
    Exemption from arrest and service of process, §99-9-35.
    Summoning witness from another state to testify in state, §99-9-33.
    Summoning witness in state to testify in another state, §99-9-31.
  Scire facias for defaulters, §99-9-21.
  Service of subpoena, §99-9-17.
  Subpoenas for witnesses, §§99-9-11 to 99-9-17.
    Depositions for use in another state, §99-9-13.
    Service, §99-9-17.
    Witness for nearby county during circuit court term, §99-9-15.
Compelling testimony in criminal cases.
  Dueling, §99-17-23.
  Gambling and futures contracts, §99-17-27.
Death penalty.
  Execution of death sentence, §99-19-55.
Dueling.
  Compelling participants to testify against another, §99-17-23.
Futures contracts.
  Compelling testimony of witness, §99-17-27.
Grand jury.
  Compelling attendance of witnesses, §§99-9-23, 99-9-25.

WITNESSES —Cont'd
Joint defendants in separate trials.
  Competency as witness for one another, §99-17-17.
Legislature.
  Crimes affecting legislature.
    Immunity for testimony, §99-17-31.
Lotteries.
  Purchaser of ticket compelled to testify against seller, §99-17-29.
Process to obtain witnesses.
  Summons and process generally, §§99-9-1 to 99-9-37.
Summons and process generally, §§99-9-1 to 99-9-37.

WOMEN.
Death penalty.
  Execution of death sentence.
    Female death row inmates, §99-19-55.

Y

YOUTH COURTS.
Attorney appointed to represent child.
  Indigent children.
    Person charged with commission of act of delinquency, §99-15-15.
Indigent persons, right to counsel.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.
Right to counsel.
  Parent or guardian determined by youth court judge to be indigent.
    Representation in abuse, neglect or termination of parental rights proceedings, §99-18-13.